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**McAllister Towing & Transportation Company, Inc.  
and its wholly owned subsidiary, McAllister  
Brothers, Inc., as a single integrated enterprise  
and Local 333, United Marine Division, Interna-  
tional Longshoremen's Association, AFL-CIO.**  
Cases 2-CA-30974 and 2-CA-31457

March 5, 2004

DECISION AND ORDER

BY MEMBERS LIEBMAN, SCHAUMBER, AND WALSH

On December 29, 2000, Administrative Law Judge Margaret M. Kern issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to adopt the judge's rulings, findings,<sup>1</sup> and conclusions only to the extent consistent with this Decision and Order.

I. INTRODUCTION

This case arises from allegations that the Respondent violated the Act during an organizing campaign by Local 333, United Marine Division, International Longshoremen's Association, AFL-CIO (Union). Initially, we address several preliminary matters that arose during the hearing.

II. THE PARTIAL *BANNON MILLS*' SANCTIONS

As a result of the Respondent's failure to produce documents subpoenaed by the General Counsel, the judge imposed limited sanctions against the Respondent under *Bannon Mills*, 146 NLRB 611 (1964). The judge granted the General Counsel's request to prove by secondary evidence those matters where there was noncom-

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<sup>1</sup> The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is to not 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), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent contends that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that the Respondent's contentions are without merit. Accordingly, we also find no merit in the Respondent's exception to the judge's refusal to recuse herself.

pliance with the subpoenas, and she precluded the Respondent from rebutting that evidence. The judge, however, denied the General Counsel's request to limit the Respondent's right of cross-examination. The judge also refused to automatically draw adverse inferences on the relevant issues, explaining that she would draw such inferences only where otherwise appropriate. We find no merit in the Respondent's exceptions to the judge's imposition of these limited sanctions.

A. *The Events Leading to the Sanctions*

Two weeks prior to the hearing, the General Counsel properly served the Respondent with subpoenas duces tecum, seeking, among other things, unit employees' W-4 forms and job applications (which the General Counsel needed to establish the authenticity of signed authorization cards disputed by the Respondent); documents showing communications between the Respondent and employees about their wages and benefits; and copies of the Respondent's applicable personnel manuals and policies.<sup>2</sup> Additionally, the General Counsel sought corporate documents and information bearing on the allegation, denied by the Respondent, that McAllister Towing and McAllister Brothers were a single employer.

The Respondent, through its counsel (Counsel), timely filed petitions to revoke the General Counsel's subpoenas. The Respondent claimed that the subpoenas would require production of "hundreds of thousands of pages of documents stored in numerous locations throughout the world." The Respondent argued that the majority of the documents sought were "not even conceivably relevant." Further, the Respondent charged that the General Counsel timed the service of the subpoenas "solely to interfere with the Respondent's preparation for the hearing."

On the morning of July 13, 1999, the day before the hearing opened, the judge held a 90-minute conference call with the parties, during which she advised Counsel that she would rule on the Respondent's petitions the following morning. The Respondent at this time had not supplied the General Counsel with any of the subpoenaed documents, not even plainly relevant documents that any employer would routinely have available, such as employees' W-4 forms and job applications.

The conference call was not transcribed. But, as the judge recounted in her decision, during the conference call she specifically instructed Counsel that the Respondent should be ready to "substantially comply" with the subpoenas the following morning. Counsel had argued

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<sup>2</sup> The General Counsel complied with the applicable guidelines, which recommend that subpoenas "should, where circumstances allow, normally be served at least 2 weeks prior to the return date." See NLRB Casehandling Manual (Part 1) Unfair Labor Practice Proceedings, Sec. 11778.

that the Respondent did not have an obligation to gather and produce the subpoenaed documents until the judge ruled on the Respondent's petitions to revoke, and that the Respondent then would be entitled to a "reasonable time" to comply. As the judge's decision makes clear, she specifically rejected Counsel's arguments.<sup>3</sup>

On the morning of the hearing, the judge granted in part and denied in part the Respondent's petitions to revoke the General Counsel's subpoenas. She then expressly ordered the Respondent to comply with the remaining subpoenas. Counsel answered that he would "consult" with his client and would advise the judge how promptly the Respondent would comply. Counsel did not offer any documents. Nor did he offer any assurances that the Respondent had even begun collecting any documents. At this point the General Counsel mentioned that he would be seeking sanctions.

Before hearing any argument on sanctions, though, the judge turned to Counsel for a further explanation of the Respondent's position with respect to compliance. Counsel declared that it was "outrageous" for the General Counsel to have served the subpoenas 2 weeks prior to the trial and to expect the Respondent to gather all the documents in such a short time period. He again asserted that the Respondent was not obliged to produce documents before it knew how the judge was going to rule on the subpoenas, and that the Respondent was entitled to a reasonable time to comply. Counsel declared that the Respondent would comply, though he gave no timetable.

In response, the General Counsel argued that the Respondent had an obligation from the day it received the subpoenas "to begin a good faith effort to gather responsive documents." The General Counsel pointed out that petitions to revoke are often ruled on at the opening of a trial. Despite the General Counsel's reference to a "good faith effort," Counsel continued to insist that it was inappropriate to require the Respondent "to comply with everything that was in [the General Counsel's] ridiculous subpoenas" before the judge's ruling.

<sup>3</sup> The judge's reporting of the conference call is substantiated by the General Counsel's and the Union's on-the-record descriptions of the call, which the judge expressly confirmed on the record. Counsel did not dispute their descriptions of what was said during the call, and does not argue here that the judge's reporting of the call is inaccurate. Counsel later asserted on the record that "the message I got from our phone call yesterday was that Respondent would be entitled to a 'reasonable time' to comply with those aspects of the subpoena that were sustained on the basis of your order." Now before the Board, however, the Respondent has not claimed that Counsel misunderstood the judge's instructions. Nor has the Respondent suggested a possible basis for such a misunderstanding.

### *B. The Judge's Imposition of Sanctions*

The judge, consistent with her views explained to the parties during the conference call, agreed with the General Counsel that the Respondent was not entitled to postpone all efforts to comply with the subpoenas. The judge then summarized the state of affairs, speaking to Counsel:

Today is July 14th, your client and yourself have been in possession of the subpoenas since July 2nd. I have not heard from you that there has been any attempt to gather any information. I don't physically see any documents here that you've brought here today and I don't see that there has been any attempt to even begin to comply with the subpoena. In view of that and in view of the fact that you have produced not one record—

Counsel interrupted the judge at this point and, for the first time, asserted that he did have documents to produce. As it turned out, though, Counsel offered the General Counsel only three pieces of correspondence—which had been in the hearing room in Counsel's possession all along. He offered no additional documents.

Given the Respondent's failure to produce a significant number of documents in response to the subpoenas, the General Counsel moved for the imposition of sanctions under *Bannon Mills*. The judge heard argument on the motion from the General Counsel, the Charging Party, and the Respondent. In opposing the motion, Counsel again insisted that, in his view, the Respondent had no obligation to gather any documents prior to the judge resolving the subpoena issues. He then said, "I'm prepared to explain what we've done in terms of ascertaining what documents might exist that would be responsive to the subpoenas and the sources we went to in order to determine how we would comply with the subpoena." Instead of proceeding with such an explanation, though, Counsel himself dismissed it as "really besides the point." He went on to repeat that the Respondent was now "entitled to a reasonable amount of time to comply with the subpoena." He concluded his argument by complaining that the Respondent was facing sanctions "when we haven't even been given an opportunity to comply."

Following Counsel's argument, the judge went off the record for 20 minutes to consider the parties' positions and several cases. Once back on the record, the judge granted some, but not all, of the sanctions requested by the General Counsel. The heart of the judge's rationale was as follows:

Although the Respondent says it is not refusing to comply, it in fact has refused to comply by not

producing any significant, really any amount of records here today.

What Respondent fundamentally misapprehends is that the focus here is on the date of the subpoena. It is not on the date of the order. The subpoena was served on July 2nd, it was a legally valid subpoena issued by the National Labor Relations Board and served upon the Respondent.

In view of the fact that there has been virtually no compliance whatsoever with any of the terms of the subpoenas in the last twelve days, I will grant the application for *Bannon Mills* sanctions but only to the extent herein.

As stated, the judge granted the General Counsel's request to prove by secondary evidence those matters where there was noncompliance with the subpoenas, and she precluded the Respondent from rebutting that evidence. The judge, however, refused to limit the Respondent's right of cross-examination. The judge also refused to automatically draw adverse inferences against the Respondent. After the ruling, Counsel requested to make an additional statement on the *Bannon Mills*' issue, but the judge refused, stating, "I've heard all the arguments."

Following a short break, the parties proceeded with opening statements on the merits of the case. After all parties had given their opening statements, Counsel advised the judge as follows:

When we took a break prior to the opening statements which was our first break since receiving the ruling on the petition to revoke the subpoenas, we undertook some efforts with respect to compliance and in that regard several boxes of documents have been ordered up and are on their way to the hearing room.

Secondly, we've reviewed our files that we have with us and have identified a number of documents that we intend to copy during the lunch break and produce.

I just wanted to put on the record that as soon as we had the opportunity following the issuance of the order with respect to the petition to revoke we began our process of compliance in producing those documents within the hour.

The judge did not alter her ruling on the *Bannon Mills*' sanctions. The judge then called a recess for lunch.

Following the lunchbreak, the General Counsel called her first witness, Richard Rosenbrock. After the witness was sworn and the judge issued a sequestration order, Counsel advised the judge that the Respondent had three litigation-size boxes of documents delivered to the hearing room and then offered them to the General Counsel.

The General Counsel, however, declined to accept the documents, and opted to proceed under the *Bannon Mills*' sanctions.

The subject of the three boxes, however, again came up in the midst of Counsel's cross-examination of Rosenbrock. The judge again heard from Counsel on why he believed the *Bannon Mills*' sanctions were unduly harsh, particularly given that the Respondent had by then proffered the three boxes of documents. Again, the judge did not alter her ruling. She explained:

[I]t is amazing to me that in twelve days no documents could be produced but within one hour of a ruling substantial documents could be produced. I think your argument unfortunately cuts both ways. When you finally saw fit to comply with the legal processes of the Board, it took less than an hour but for twelve days when you saw it not fit to comply you came in here and said we're not in a position to comply. That's precisely what the General Counsel's point was and that's precisely the point of the sanction. It has to mean something.

Counsel then advised the judge that the Respondent intended to file with the Board a request for special permission to appeal her ruling. The Respondent filed such a request on July 15, 1999, but voluntarily withdrew it the next day.

### C. Discussion

The Board is entitled to impose a variety of sanctions to deal with subpoena noncompliance, including permitting the party seeking production to use secondary evidence, precluding the noncomplying party from rebutting that evidence or cross-examining witnesses about it, and drawing adverse inferences against the noncomplying party. See, e.g., *International Metal Co.*, 286 NLRB 1106, 1112 fn. 11 (1986) (precluding employer from introducing into evidence documents it had failed to produce in response to the General Counsel's subpoenas). The Board's authority to impose such sanctions flows from its inherent "interest [in] maintaining the integrity of the hearing process." *NLRB v. C. H. Sprague & Son, Co.*, 428 F.2d 938, 942 (1st Cir. 1970); see also *Perdue Farms, Inc., Cookin' Good Division v. NLRB*, 144 F.3d 830, 834 (D.C. Cir. 1998) (approving Board's application of the "preclusion rule" as being necessary to ensure compliance with subpoenas).

The exercise of this authority is a matter committed in the first instance to the judge's discretion. See *NLRB v. American Art Industries*, 415 F.2d 1223, 1229-1230 (5th Cir. 1969), cert. denied 397 U.S. 990 (1970) (finding trial examiner did not "abuse his discretion" in precluding employer from introducing evidence on number of em-

ployees in unit after employer refused to produce relevant subpoenaed documents). See also *Midland National Life Insurance Co.*, 244 NLRB 3, 6 (1979) (discussing the discretion of a trial examiner to refuse to allow evidence where evidence is not made available pursuant to a subpoena); cf. *Equipment Trucking Co.*, 336 NLRB 277 fn. 1 (2001) (no abuse of discretion where the judge struck the respondent's answer regarding allegations related to agents who evaded subpoenas with the aid of the respondent). Accordingly, we review the judge's imposition of sanctions under the "abuse of discretion" standard. See *Perdue Farms*, 144 F.3d at 834 (applying "abuse of discretion" standard).

We all agree, as our dissenting colleague observes, that "a party who simply ignores a subpoena pending a ruling on a petition to revoke does so at his or her peril." What divides us here is whether the record establishes, with sufficient clarity, that this is what the Respondent did. In contrast to our colleague, we find that the judge reasonably concluded, on the record before her, that *Bannon Mills'* sanctions were indeed warranted.

The Respondent did not comply with the subpoenas upon receiving them, even with respect to items that clearly were relevant and available. Further, the Respondent did not begin compliance upon the judge's disposition of its petitions to revoke, despite the judge's express instructions the prior day and despite the judge's express order following her ruling. Rather, Counsel advised that he would "consult" with the Respondent and advise the judge and the General Counsel how promptly the Respondent would comply. As the judge aptly observed, "A subpoena is not an invitation to comply at a mutually convenient time." Any "consultations" Counsel needed to have with the Respondent should have occurred before the opening of the hearing.

We have considered the Respondent's argument that the subpoenas, served 2 weeks prior to the hearing, sought a substantial number and range of documents. We are not persuaded that this fact excuses the Respondent's conduct. Although the General Counsel's subpoenas contained a total of 60 paragraphs, the actual number of distinct categories of documents sought was significantly less than 60. Because the Respondent denied that "McAllister Towing & Transportation, Inc." and "McAllister Brothers" were a single integrated enterprise, the General Counsel served each entity with a subpoena (containing approximately 30 pars.) that was largely duplicative of the subpoena served on the other.

Moreover, as the judge observed, the scope of the General Counsel's subpoenas was largely a function of the Respondent's answer to the complaint, which denied all or part of every allegation, including, as examples,

such indisputable matters as jurisdiction and the Union's labor organization status at "material times."<sup>4</sup> In any event, the breadth of the subpoenas does not establish that they were unduly burdensome. See *NLRB v. Carolina Food Processors, Inc.*, 81 F.3d 507, 513–514 (4th Cir. 1996) (emphasizing that "a subpoena is not unduly burdensome merely because it requires the production of a large number of documents" in rejecting employer's motion to quash General Counsel's subpoena seeking several thousands of documents). Nor did it justify the Respondent in failing to take even minimally reasonable steps to substantially comply with the subpoenas in a timely fashion. We agree with the General Counsel that the Respondent at the very least had an obligation "to begin a good faith effort to gather responsive documents" upon service of the subpoenas.

As the judge suggested, such an effort might have avoided the need for sanctions. We emphasize, moreover, that any efforts the Respondent might have made toward compliance would not have compromised its ability to contest the scope of the subpoenas before the appropriate authorities—the judge and, through the special appeal procedure (abandoned by the Respondent), the Board. Now, however, the judge's exercise of discretion in the face of Counsel's decision to defy the authority of the judge and abandon the Board's established procedures is the sole appropriate issue before us.

The judge afforded Counsel numerous opportunities to be heard before she imposed sanctions. As described, before the General Counsel even moved for sanctions, the judge heard from Counsel on the Respondent's position with respect to compliance. Counsel asserted that he would consult with his client and comply within a "reasonable time." When the General Counsel actually moved for sanctions, the judge again afforded Counsel an opportunity to address the Respondent's position on the compliance issues. Counsel professed his willingness "to explain what we've done in terms of ascertaining what documents might exist that would be responsive to the subpoenas and the sources we went to in order to determine how we would comply with the subpoena" but, *of his own accord*, never offered such an explana-

<sup>4</sup> The Union was a well-established labor organization with a long history of representing employees in the maritime industry. Counsel, moreover, was personally familiar with the Union. See *Bridgeport & Port Jefferson Steamboat Co.*, 313 NLRB 542 (1993). Further, Counsel himself represented the Respondent on June 13, 1997, when it entered into a stipulated election agreement with the Union without raising any doubts about its labor organization status. This was contemporaneous with the alleged violations. We thus find it inexplicable that Counsel would deny that the Union was a statutory labor organization at the "material times."

tion, commenting instead that it was “really besides the point.”

Our dissenting colleague acknowledges Counsel’s omission, but asserts that the judge too erred in not pressing Counsel for more specific information about the Respondent’s compliance efforts and about how long it would take the Respondent to produce the subpoenaed documents. We respectfully disagree.

As the judge emphasized, the Respondent was obliged to substantially comply with the subpoenas upon the judge’s order. The Respondent failed to do so. That the Respondent might have intended or been able to produce the documents at some later point is no excuse; the General Counsel’s motion was ripe for decision. Accordingly, the judge gave all sides an opportunity to be heard on the motion and then acted on it.

As for the judge’s decision not to press Counsel for more specific information about the Respondent’s compliance efforts, it was clear that the Respondent had not made any significant efforts to gather the subpoenaed documents. Counsel repeatedly asserted that the Respondent had no obligation to gather any documents prior to the judge’s disposition of its petitions to revoke. Although there would be nothing inconsistent in the Respondent taking this position while simultaneously gathering the relevant documents, there is no evidence that the Respondent pursued the latter component of such a dual strategy.<sup>5</sup>

Similarly, the judge did not abuse her discretion by failing to press Counsel about how long it would take the

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<sup>5</sup> Prior to hearing the General Counsel’s motion for sanctions, the judge challenged Counsel as follows: “I have not heard from you that there has been any attempt to gather any information. I don’t physically see any documents here that you’ve brought today and I don’t see that there has been any attempt to even begin to comply.” Counsel did not respond with an explication of the Respondent’s compliance efforts. Instead, Counsel offered only three pieces of correspondence that he had in the hearing room all along.

Then, following the judge’s imposition of sanctions and opening statements, Counsel asserted that the Respondent was now undertaking “some efforts with respect to compliance” and had ordered up some documents. He explained, “I just wanted to put on the record that as soon as we had the opportunity *following* the issuance of the order with respect to the petition to revoke *we began our process of compliance*” (emphasis added). This may not have been an explicit admission that the Respondent had not taken steps toward compliance prior to the opening of the hearing, but Counsel’s assurance that the Respondent was then beginning its process of compliance leaves little doubt about the matter.

This conclusion is further evidenced by the Respondent’s subsequent production of three boxes of documents later in the day. These were not documents that the Respondent previously had gathered in anticipation of complying with the subpoenas. Indeed, Counsel did not know what the boxes contained. When directly asked if the boxes contained employees’ W-4 forms, Counsel could offer only that the three boxes contained a “large number of documents.”

Respondent to comply. Counsel had demonstrated that he was unable to give a specific timetable.<sup>6</sup>

Finally, we find, in agreement with the judge, that the Respondent’s noncompliance was likely to prejudice the General Counsel’s case and the overall proceeding. The General Counsel had commenced his case-in-chief and, by Counsel’s own admission, the Respondent was just then beginning its process of compliance. Even assuming that no further problems arose (a dubious assumption given a subsequent incident involving subpoenaed Coast Guard records, described in section IV(C)(2) of the judge’s decision), the General Counsel likely would have been forced to alter, or even delay, the presentation of her case over the ensuing hearing dates depending on the Respondent’s conception of a “reasonable time” and what documents the Respondent happened to produce or not produce. As the judge pointed out, there was already difficulty getting subpoenaed witnesses to appear when scheduled because they were aboard vessels at various times. The Respondent’s failure to timely produce subpoenaed documents could have meant that the General Counsel would have been forced to recall previously examined witnesses, as well, which would have further disrupted and prolonged the hearing.

For all of these reasons, we find that the judge did not abuse her discretion in imposing limited sanctions against the Respondent.<sup>7</sup>

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<sup>6</sup> When the judge first ordered the Respondent to produce the subpoenaed documents, Counsel responded, “at the next break we will consult with our client . . . and we will advise you about how promptly.” When the judge repeated her order, Counsel explained, “Our intention would be to produce them as quickly as we possibly can within a reasonable period of time.” Even after the General Counsel raised the possibility of sanctions, Counsel again offered nothing more specific than that the Respondent “will now endeavor as quickly as we can to produce the documents.”

<sup>7</sup> The judge recommended that the Board warn Counsel based on Counsel’s handling of the subpoenas, his answer to the complaint, and other incidents arising during the hearing. We do not pass on the judge’s recommendation. Should any person believe that an attorney or other party representative has engaged in misconduct during any stage of any Agency proceeding, allegations of such misconduct are to be submitted to the investigating officer under Sec. 102.177 of the Board’s Rules and Regulations. Those allegations are not to be submitted to the Board in the first instance. Sec. 102.177(e) ensures that “All allegations of misconduct” will be handled according to established procedures with appropriate due process safeguards. The procedures require the investigating officer to complete a full investigation even before considering whether to institute disciplinary proceedings. Moreover, even when an investigation leads to the institution of disciplinary proceedings, the proceedings are conducted in accordance with all of the due process measures described in Sec. 102.177(e) and (f). We express no view on whether disciplinary action, or even the institution of a disciplinary proceeding, is warranted with respect to Counsel’s conduct during the proceedings. We shall transmit the judge’s recommendation to the investigating officer, with whom the judge should have filed her recommendation.

### III. THE RESPONDENT'S ALLEGED UNFAIR LABOR PRACTICES

The Union's campaign began in May 1997<sup>8</sup> and focused on a unit of the Respondent's tugboat workers. On May 30, the Union petitioned the Board to hold a representation election, which the Board conducted on July 2. The Union lost the election by a vote of 32 to 7. On October 21, 1998, however, the Board set aside the election based on the Respondent's grant of an across-the-board wage increase to the unit employees in June, and directed a second election. The election was never held.

Based on charges filed by the Union in November 1997 and May 1998, the General Counsel, on March 31, 1999, issued the complaint, alleging, among other things, that the Respondent violated Section 8(a)(1) by granting employees: (1) the June wage increase; (2) new TVs and VCRs for their tugboats; (3) a grievance procedure; (4) access to an existing 401(k) retirement plan; (5) five paid holidays; and (6) another across-the-board wage increase in December. The complaint also alleges that a bargaining order is necessary to remedy these violations. In anticipation of securing a bargaining order, the complaint further alleges that the Respondent violated Section 8(a)(5) and (1) by failing and refusing to recognize and bargain with the Union since June 6, the date the Union allegedly obtained a valid card majority, and by unilaterally granting the above benefits.

#### A. The Judge's Decision

The judge found some, but not all, of the alleged violations. The judge found that the Respondent's grant of the June wage increase was unlawful. In making this finding, however, the judge relied only on evidence that the Respondent accelerated the timing of the increase from about July 6 to June 1 to discourage employee support for the Union. The judge also found unlawful the Respondent's postelection extension of its 401(k) plan to employees and grant of five paid holidays. The judge dismissed all of the allegations relating to the TVs and VCRs, the grievance procedure, and the December wage increase.

Turning to the remedy, the judge found that the Respondent's unfair labor practices warranted issuance of a

remedial bargaining order based on the Union's showing that it had obtained valid authorization cards from a majority of unit employees by June 6. See *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). The judge found that the violations, particularly those involving the June wage increase and the 401(k) plan, were serious and of a character that tends to have a lasting impact on employees. Finally, she found that the Respondent's failure and refusal to bargain with the Union since June 6 and its unilateral granting of the wage, 401(k), and holiday benefits violated Section 8(a)(5) and (1).<sup>9</sup>

#### B. Discussion

We agree with the judge that the Respondent violated Section 8(a)(1) by accelerating the timing of the mid-year wage increase from July to June. See *Mercy Hospital Mercy Southwest Hospital*, 338 NLRB No. 66 slip op. at 1 (2002) (emphasizing that timing alone of a benefit may be unlawful); see also *Onan Corp.*, 338 NLRB No. 139 (2003) (recognizing that timing of grant of benefit may be unlawful even if benefit would have been granted later in any event). We further agree that the Respondent violated Section 8(a)(1) by extending its 401(k) plan to the unit employees and granting the employees five paid holidays. We do not find in this case, however, that a *Gissel* bargaining order is warranted to remedy the violations.

Although this is a close case, the Respondent did not engage in what the Board and the courts have characterized as "hallmark" violations (e.g. threats of plant closure, job loss, and discharge) justifying the issuance of bargaining orders. See *Adam Wholesalers, Inc.*, 322 NLRB 313, 314 (1996); *Koons Ford of Annapolis*, 282 NLRB 506, 508 (1986), *enfd.* 833 F.2d 310 (4th Cir. 1987) (unpublished table decision), *cert. denied* 485 U.S. 1021 (1988). This is not to suggest that the Respondent's violations were insignificant, but, rather, simply to recognize that the violations were not of the sort that typically preclude the holding of a fair rerun election.

The judge's decision to recommend a bargaining order, moreover, was influenced by her assessment that the June wage increase would have a lasting impact on unit employees. She emphasized that, because such increases "regularly appear in paychecks, they are a continuing reminder that 'the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if not obliged.'" We agree that unlawful wage increases do tend to have a lasting impact on employees. In this instance, however, the judge did not find that the increase itself was unlawful. Instead, she

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However, we do disavow the judge's suggestion that Respondent's counsel previously had engaged in misconduct during a hearing. In the case cited by the judge for that proposition, *Salvation Army Residence*, 293 NLRB 944 (1989), *enfd.* 923 F.2d 846 (2d Cir. 1990) (unpublished table decision), the Board adopted the administrative law judge's specific finding that Respondent's counsel had not engaged in any unethical conduct in that case. Accordingly, the judge erred in suggesting that Respondent's counsel has a prior record of interfering with the Board's hearing process.

<sup>8</sup> All dates are 1997, unless stated otherwise.

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<sup>9</sup> The judge did not make a finding that the Union demanded recognition on or prior to June 6.

found only that the timing of the increase was unlawful.<sup>10</sup> The judge credited the Respondent's claim that it would have granted a mid-year increase even in the absence of the organizing campaign to address its legitimate concern over employee turnover. Accordingly, at least after July, the employees would, in any event, have been receiving the wage adjustment.

It is true that the unit employees continue to benefit from the Respondent's unlawful extension of its 401(k) retirement plan and its grant of five paid holidays. But even considering these additional violations, we are unable to conclude that a bargaining order is necessary. As the Respondent argues, the Board has found *Gissel* bargaining orders unwarranted in cases involving comparable, and even slightly more egregious, violations. See, e.g., *Yoshi's Japanese Restaurant & Jazz House*, 330 NLRB 1339 (2000) (refusing to issue *Gissel* order where employer unlawfully granted wage increases to union activists, interrogated employees, solicited grievances, and threatened plant closure); see also, e.g., *G.H. Bass Caribbean, Inc.*, 306 NLRB 823 (1992) (refusing to issue *Gissel* order where employer unlawfully granted an across-the-board wage increase and dental insurance coverage).

For these reasons, we shall not issue a bargaining order to remedy the Respondent's unfair labor practices.<sup>11</sup> At the same time, we find that a notice posting alone likely will be insufficient to permit the holding of a fair rerun election.<sup>12</sup> As discussed, the employees will continue to be reminded of the Respondent's unlawful conduct by the 401(k) benefits and five paid holidays. Also, as the General Counsel contends, it is significant that the Respondent continues to employ General Manager Steven Kress, who was personally involved in the unlawful grants of benefits described above. See *Consec Security*, 325 NLRB 453, 454-455 (1998), enfd. 185 F.3d 862 (3d Cir. 1999) (recognizing that participation of high-ranking management officials in unfair labor practices compounds coercive effect). In these circumstances, we find that additional remedial action is necessary to dissipate as much as possible the lingering effects of the Respon-

<sup>10</sup> The General Counsel's reliance on *Overnite Transportation, Co.*, 329 NLRB 990, 991 (1999), in which the Board counted an "unprecedented wage increase" among the employer's "hallmark" violations of the Act, is thus misplaced.

<sup>11</sup> It therefore is unnecessary to pass on the Respondent's exceptions to the judge's finding that the Union obtained a valid card majority. Similarly, we find it unnecessary to consider the Respondent's motions to supplement the record with more recent information on the identification of employees in the relevant bargaining unit.

<sup>12</sup> The Board's traditional remedies do not require a respondent to withdraw unlawfully granted benefits from employees. See *Parts Depot, Inc.*, 332 NLRB 670, 675 (2000); *Color Tech Corp.*, 286 NLRB 476, 477 (1987).

dent's unlawful conduct and to ensure a free and fair rerun election. Therefore, we shall require that the Respondent permit a Board agent, at its Staten Island yard, to read aloud to employees the notice in the presence of a responsible management official at the yard. As the Board has previously observed, "the public reading of the notice is an 'effective but moderate way to let in a warming wind of information and, more important, reinsurance.'" *United States Service Industries*, 319 NLRB 231, 232 (1995) (quoting *J.P. Stevens & Co. v. NLRB*, 417 F.2d 533, 540 (5th Cir. 1969)), enfd. 107 F.3d 923 (D.C. Cir. 1997).

Finally, because we have determined not to issue a bargaining order in this case, we must also reverse the judge's findings that the Respondent violated Section 8(a)(5) and (1) by failing and refusing to bargain with the Union since June 6 and by unilaterally granting the benefits discussed above.

#### ORDER

The National Labor Relations Board orders that the Respondent, McAllister Towing & Transportation Company, Inc. and its wholly owned subsidiary, McAllister Brothers, Inc., as a single enterprise, Staten Island, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Accelerating the timing of across-the-board wage increases to discourage employees from engaging in protected activities.

(b) Granting employees a 401(k) retirement plan and paid holidays to discourage them from engaging in protected activities.

(c) 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) Within 14 days after service by the Region, post at its facilities in Staten Island and 17 Battery Place, New York, copies of the attached notice marked "Appendix."<sup>13</sup> Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent 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

<sup>13</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

notices are not altered, defaced, or covered by any other material.

(b) Within 14 days after service by the Region, mail a copy of the notice marked "Appendix" to all employees in the appropriate unit who have been employed by the Respondent at any time since June 6, 1997. The notice shall be mailed to the last known address of each of these employees after being signed by the Respondent's authorized representative. The appropriate unit is:

All full-time and regular part-time licensed and unlicensed employees on tugboats operated by Respondent regularly in the Port of New York and vicinity, defined as an area extending north to Yonkers, east to Stepping Stones, and south to the Colregs demarcation line, but excluding all captains, all shore-based and office personnel, and guards, professional employees, and supervisors as defined in the Act.

(c) Within 14 days after service by the Region, permit a Board agent, at the Respondent's Staten Island yard, to read aloud to all employees in the appropriate unit the notice marked "Appendix" in the presence of a responsible management official at the yard.

(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 the Respondent has taken to comply.

Dated, Washington, D.C. March 5, 2004

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Wilma B. Liebman, Member

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Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER SCHAUMBER, dissenting in part.

I join my colleagues in finding that Respondent violated Section 8(a)(1) of the Act by its 1-month acceleration of a scheduled wage increase, and I agree that a remedial bargaining order is not an appropriate remedy for the violations found in this case. However, unlike my colleagues, I would find that the judge erred in imposing *Bannon Mills*'<sup>1</sup> sanctions against Respondent because the record does not establish deliberate defiance or abuse of the Board's subpoena procedures sufficient to impugn the integrity of the hearing process.<sup>2</sup>

<sup>1</sup> 146 NLRB 611 (1964).

<sup>2</sup> Because of the judge's erroneous *Bannon Mills*' ruling, the case should be remanded for reconsideration of the two postelection 8(a)(1) violations found by the judge. Since I believe the judge's *Bannon*

## I. FACTS

The General Counsel filed complaint against Respondent on March 31, 1999, and Respondent served its answer on April 14. More than 2 months later, and just 2 weeks before the hearing, Respondent received on July 2, 1999, two broad subpoenas *duces tecum* issued by the General Counsel seeking some 60 categories of documents.<sup>3</sup> On July 7, Respondent received a third, albeit brief, subpoena from the General Counsel. Respondent filed timely petitions to revoke, which were heard by the judge during a teleconference on July 13, the day before the hearing.

During the July 13 teleconference, a transcript of which is not available, the judge informed the parties that she would rule on the petitions the following morning. The judge also apparently informed counsel for Respondent that she expected him to be in a position to "substantially comply" with the subpoenas at the start of the hearing. Respondent's counsel understood from the teleconference, erroneously as it turned out, that Respondent would be permitted at least a "reasonable time" to produce documents responsive to those portions of the subpoenas the judge ultimately sustained. [Tr. at 35.]

On the morning of the hearing, the judge granted Respondent's petitions to revoke as to various categories of documents, then ordered Respondent to immediately produce the balance of the subpoenaed records. Respondent's counsel informed the judge that he could not immediately produce the documents, and requested the opportunity to consult with his client to determine how quickly the documents could be brought to the hearing. Counsel represented to the judge that he would comply "as promptly as possible." Without asking either how long it would take to produce the documents or how thorough the resulting production would be, the judge

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*Mills*' ruling renders the record inadequate to find the two postelection violations, I disagree with the majority's notice-reading remedy. Furthermore, since I agree with the majority that the Respondent violated 8(a)(1) by the timing of its wage increase, *but that the wage increase itself was not unlawful*, I do not join my colleagues in their observation regarding the impact on employees of *an unlawful wage increase*.

<sup>3</sup> As to at least two of the subpoenas at issue, it is true that the General Counsel satisfied the minimum "recommend[ed]" guidelines set forth in the Board's Casehandling Manual, NLRB Casehandling Manual (Part I) Unfair Labor Practice Proceedings, Sec. 11778, by serving the subpoenas exactly 2 weeks before the hearing. However, satisfaction of bare minimum standards is not a goal to which the General Counsel should aspire, nor one that we should endorse. The timing of the issuance of a subpoena as well as its breadth are relevant factors that should be considered in assessing the reasonableness of a party's compliance efforts for purposes of *Bannon Mills*' sanctions. In my view, this case is also indicative of the need for revisions to the Board's discovery procedures. I would require earlier issuance of subpoenas and a mandatory meet and confer conference before the filing of a petition to revoke.

entertained argument on *Bannon Mills*' sanctions. During the course of that argument, Respondent's counsel represented that he was "prepared to explain what we've done in terms of ascertaining what documents might exist that would be responsive to these subpoenas and the sources we went to in order to comply . . ." [Tr. at 36.] Regrettably, counsel did not actually make a proffer specifying the scope of Respondent's compliance efforts, and the judge did not ask for one.

Instead, the judge inferred, based on Respondent's arguments and the absence of any significant production of documents immediately following her ruling on the petitions to revoke, that Respondent had engaged in no good faith efforts to comply with the subpoenas prior to the hearing. Consequently, the judge imposed partial *Bannon Mills*' sanctions, permitting the General Counsel to prove by secondary evidence those issues on which there was, in her view, noncompliance with the subpoenas, and precluding Respondent from rebutting that evidence. The parties then made opening statements and adjourned for lunch. Before doing so, Respondent's counsel informed the judge that several boxes of documents were on their way to the hearing room.

After the lunch break and before the General Counsel called his first witness, Respondent's counsel offered three boxes of documents for examination, but the General Counsel refused, preferring to litigate under the judge's *Bannon Mills*' ruling. As a result of this ruling, Respondent could not present witness testimony in defense of complaint allegations that it unlawfully granted employees 401(k) and holiday benefits.<sup>4</sup>

## II. ANALYSIS

### A. The Judge's *Bannon Mills*' Sanctions

A *Bannon Mills*' preclusion sanction serves two related purposes. First, to prevent a litigant who willfully frustrates discovery from gaining an unfair advantage by introducing evidence in support of his position on the factual issue for which the discovery was sought. Second, evidentiary sanctions serve to "protect the integrity of the Board's hearing process"<sup>5</sup> by deterring misconduct (such as flagrant defiance of valid subpoenas) inimical to the adjudicative process.

In determining the appropriateness of *Bannon Mills* sanctions, the Board has explained that:

<sup>4</sup> Ironically, the *Bannon Mills*' ruling also affected the General Counsel's presentation of his case-in-chief. Even though the Respondent made available its employees' W-4 forms, the General Counsel was unable to use them to authenticate employee signatures on authorization cards, requiring a more laborious authentication process using secondary evidence.

<sup>5</sup> NLRB v. C.H. Sprague & Sons Co., 428 F.2d 938, 942 (1970).

Whether it be production of a document or testimony as a witness it is the *deliberate refusal* to timely produce or testify that is the critical element of abuse of Board subpoena process, and/or indicative of an adversary's intended imposition of an unfair evidentiary disadvantage upon his opponent." *People's Transportation Service*, 276 NLRB 169, 222 (1985) (emphasis in original).

The requirement of a "deliberate refusal" or similar willful misconduct is akin to the "bad faith" finding required for imposition of evidentiary sanctions by a district court pursuant to its "inherent powers."<sup>6</sup> Implicit in that requirement is a showing of misconduct sufficiently egregious that it can fairly be said to impugn the integrity of the Board's hearing process.

In the instant case, the sole basis for the judge's imposition of sanctions, which occurred before the presentation of any evidence, was Respondent's alleged failure to comply with the General Counsel's subpoenas. More specifically, the judge faulted Respondent for failing to produce responsive documents at the hearing immediately following her ruling on the petitions to revoke, and for failing to engage in "any meaningful attempt to comply" with the subpoenas before that ruling.

Turning to the latter rationale first, I concur with my colleagues and with the judge that a party who simply ignores a subpoena pending a ruling on a petition to revoke does so at his or her peril. If Respondent, in fact, engaged in no efforts to identify and gather responsive documents prior to the hearing (which here coincided with the ruling on the petitions to revoke), I would agree that *Bannon Mills*' sanctions would be appropriate.<sup>7</sup> However, it is incumbent upon a judge prior to imposing

<sup>6</sup> See, e.g., *Morrison v. International Programs Consortium, Inc.*, 240 F.Supp.3d 53, 56 (D.D.C. 2003) (alleged misconduct must constitute "bad faith" to justify invocation of court's inherent powers to sanction); *United States v. Wallace*, 964 F.2d 1214, 1219 (D.C. Cir. 1992) ("[I]t is settled that a finding of bad faith is required for sanctions under the court's inherent powers."); See also *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 767 (1980) (remanding for failure to make specific bad faith findings required for invocation of court's inherent powers).

<sup>7</sup> That is not to say, however, that a party who has filed a timely petition to revoke must be prepared to produce all responsive documents immediately upon a ruling on that petition. If that were the case, the right to file a meritorious petition to revoke would be eviscerated, as the disruption and expense of gathering and duplicating documents in response to what later may be ruled irrelevant and/or overly burdensome subpoena requests already would have been incurred. A *post hoc* ruling that such efforts and expenses were unnecessary affords little solace. Moreover, such a standard would create an incentive for the General Counsel to wait until the last minute to issue the broadest possible subpoenas, thereby disrupting a respondent's hearing preparation and forcing respondent to choose between the Scylla of unwarranted expense and the Charybdis of potential sanctions.

sanctions to ascertain whether such noncompliance actually occurred and to establish a record to that effect sufficient for our review. Here, despite Respondent's counsel's proffer that he was prepared to describe Respondent's prehearing compliance efforts, and despite Respondent's production of three litigation boxes full of documents within a few hours, the judge never asked Respondent's counsel what compliance efforts had been made.<sup>8</sup> In my view, that was error and deprived us of the facts necessary to meaningfully assess the propriety of the sanctions imposed.

Because the judge never asked Respondent about the nature of its prehearing compliance efforts before imposing sanctions, my colleagues must parse the record for fragile threads from which to weave a sheer (albeit factually beguiling) inference, held together by interpretation and supposition, that Respondent sat by idly awaiting the judge's ruling on the petitions to revoke.<sup>9</sup> If the sanctions in this case were less severe (amounting to a default judgment on certain issues), or if the Respondent bore the burden of proving that sanctions were not appropriate, such artistry might suffice. However, the stakes here were high and the burden of justifying the

<sup>8</sup> My colleagues cite various record excerpts in support of their position that the judge provided Respondent sufficient opportunity to affirmatively detail its prehearing subpoena compliance efforts. However, the record is replete with numerous instances in which the judge cut off argument on precisely this point. See, e.g., Tr. at 28 (Counsel: "I'm not finished. With respect to the subject of the conference call yesterday—" Judge: "I'm not talking about our conference call. You're producing the documents now."); Tr. at 29 (Counsel: "Before we get to that Your Honor, I just want to—" Judge: "No. . . . I'll decide what we do when."); Tr. at 40 (Counsel: "Your Honor, may I make a brief statement on this [sanctions] issue?" Judge: "No. I've heard all the arguments.") More importantly, however, the burden was not on Respondent to establish why sanctions were not appropriate, the burden was on the judge to make findings to show why they were.

<sup>9</sup> For example, my colleagues repeatedly refer to statements by Respondent's counsel that Respondent would "begin compliance" now that the judge had ruled on the petitions to revoke, and infer from such statements that no prehearing subpoena compliance efforts occurred. However, when read in context, the statements plainly refer to compliance with the judge's order on the petitions to revoke; not with the subpoenas themselves. Since the judge's order substantially narrowed the scope of the subpoenas, and since the order was not issued until the opening of the hearing, Respondent obviously could not have begun complying with the judge's order in advance of the hearing. In fact, in the single instance in which the judge specifically asked whether Respondent had engaged in prehearing compliance efforts with respect to a particular subpoena paragraph, the answer was yes. See Tr. at 23. Hence, contrary to the majority, I find that the only evidence that does exist regarding whether Respondent pursued a "dual strategy" of complying with the subpoenas while preserving its argument that it was not obligated to do so in advance of a ruling on the petitions to revoke—namely, Respondent Counsel's representations and the actual production of three boxes of documents at the hearing before the presentation of a single witness—actually undermines the judge's and majority's inferences.

imposition of sanctions rested squarely on the judge. In absolute candor, the best *any* of us can do on this record is to guess at what may have happened, and, in my view, that is simply not good enough.

Respondent's failure to produce more than a handful of documents immediately following the judge's ruling on the petitions to revoke is a closer call. The judge apparently did signal to Respondent's counsel during the teleconference the night before that she expected Respondent to be in a position to "substantially comply" with the subpoenas when the hearing opened, and this Respondent failed to do. Though I agree that noncompliance with a judge's directive may warrant sanctions in an appropriate case, several factors militate against that result here.

First, this is not the typical *Bannon Mills*' case in which a party has steadfastly refused to produce documents or witnesses despite a directive to do so.<sup>10</sup> Here, after receiving the judge's ruling, Respondent committed to producing the responsive documents "as promptly as possible." The Respondent, therefore, never refused to provide the information that the General Counsel sought.<sup>11</sup> Second, absent a transcript of the teleconference, it is difficult to assess whether Respondent's counsel reasonably could have believed, as he maintained at the hearing, that Respondent would be permitted time to comply with the judge's ruling once rendered.<sup>12</sup> Third, the facts that the General Counsel's subpoenas issued at the last possible minute and were not ruled upon until the day of the hearing are mitigating factors that should have

<sup>10</sup> See, e.g., *NLRB v. American Art Industries*, 415 F.2d 1223, 1229 (5th Cir. 1969), cert. denied 397 U.S. 990 (1970) (affirming imposition of sanctions where company repeatedly refused to produce subpoenaed records despite denial of motion to quash); *Midland National Life Insurance Co.*, 244 NLRB 3, 4–7 (1979), enf. 621 F.2d 901 (8th Cir. 1980) (affirming sanctions where respondent's counsel encouraged witnesses to defy subpoenas and persisted in refusing to produce subpoenaed witnesses and records).

<sup>11</sup> Nor did Respondent, as the judge implies, insist on complying with the judge's order to produce on a "timetable of its own choosing." Rather, Respondent's counsel requested the opportunity to confer with his client on how long it would take to produce the documents, at which point the judge could then assess whether that amount of time would constitute a sufficiently prejudicial delay to warrant the imposition of sanctions. See Tr. at 36 ("[W]e think the orderly way to proceed is that we consult with our client and we advise you how quickly we can comply [with your order] and if the amount of time it would take for Respondent to comply is such that it constitutes non-compliance, then we can have an argument about sanctions . . .").

<sup>12</sup> A mistaken belief is not tantamount to a deliberate refusal. Unlike my colleagues, I do not view Respondent's decision not to highlight this factual issue in its arguments to the Board as undermining Respondent's position that the judge was ambiguous about her expectation during the teleconference. Because no transcript of the teleconference exists, all Respondent could cite to is its counsel's record statement, which is already before us.

been weighed in assessing the appropriateness of sanctions. Finally, in this case, the judge made no effort before imposing sanctions to determine if the responsive documents could be produced without prejudicial delay, a necessary predicate to finding that the conduct would truly impugn the integrity of the hearing process.

Thus, for the reasons stated above, I conclude that the judge erred in imposing *Bannon Mills*' sanctions without first: (1) determining the scope of Respondent's prehearing compliance efforts, and (2) making some effort to ascertain how long it would take to Respondent to fully comply with her ruling on the petitions to revoke. The latter facts were necessary to properly balance the detriment of any delay to the proceeding against the prejudice of preclusive sanctions to Respondent's ability to defend the unfair labor practice allegations. In short, *Bannon Mills*' sanctions, like the inherent powers of the courts, must be exercised with restraint and discretion. See, e.g., *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (1991). Because I do not believe that happened here, I respectfully dissent.<sup>13</sup>

Dated, Washington, D.C. March 5, 2004

Peter C. Schaumber, Member

NATIONAL LABOR RELATIONS BOARD

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 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
- Act together with other employees for your benefit and protection

<sup>13</sup> The judge's erroneous *Bannon Mills*' ruling precluded Respondent from presenting evidence in support of its defense that two alleged Sec. 8(a)(1) violations—the postelection extension of the company 401(k) plan to unit employees and the grant of five paid holidays—were part of a corporate wide decision making process unrelated to union activity. Accordingly, I would remand these issues to the judge with instructions to reopen the record, permit the Respondent to introduce the erroneously excluded testimony, and make supplemental findings and conclusions.

Choose not to engage in any of these protected activities.

WE WILL NOT accelerate the timing of across-the-board wage increases to discourage you from supporting Local 333, United Marine Division, International Longshoremen's Association, AFL-CIO.

WE WILL NOT grant you a 401(k) retirement plan and paid holidays to discourage you from supporting the Union.

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

MCALLISTER TOWING & TRANSPORTATION COMPANY, INC. AND ITS WHOLLY OWNED SUBSIDIARY, MCALLISTER BROTHERS, INC., AS A SINGLE INTEGRATED ENTERPRISE

*Ian Penny, Esq.* and *Jessica Drangel, Esq.*, for the General Counsel  
*Kenneth Margolis, Esq.* and *Laura Putney, Esq.*, for McAllister Towing & Transportation Company, Inc. and for McAllister Brothers, Inc.  
*James Wasserman, Esq.* and *Karen Honeycutt, Esq.*, for the Charging Party

DECISION

STATEMENT OF THE CASE

MARGARET M. KERN, Administrative Law Judge. This case was tried before me in New York, New York, on July 14, 15, 19, 27, 28, August 6, October 12, 13, and 14, 1999. The complaint which issued on March 31, 1999, was based on unfair labor practice charges filed on November 26, 1997, and May 11, 1998, by Local 333, United Marine Division, International Longshoremen's Association, AFL-CIO (Local 333 or the Union) against McAllister Brothers, Inc. (Respondent). An answer was filed on April 14, 1999.

It is alleged that in May 1997, after the commencement of an organizing drive, a majority of Respondent's employees working on tugboats operating in New York harbor signed authorization cards for the Union. On May 30, 1997, the Union filed a petition in Case 2-RC-21862 and on June 13, the parties entered into a stipulated election agreement. The Board conducted an election on July 2, and the Union lost by a vote of 32 to 7 with 2 challenged ballots. On July 9, 1997, the Union filed timely objections to the election and on March 20, 1998, a hearing officer sustained one of the objections<sup>1</sup> and recommended that the election be set aside and a new election be conducted. On October 21, 1998, the Board adopted the findings of the hearing officer and directed a second election.

It is further alleged in June 1997, Respondent threatened employees with loss of work if they voted in favor of the Un-

<sup>1</sup> The objection sustained by the hearing officer involved the granting of an across-the-board wage increase in June 1997. This wage increase is alleged as an unfair labor practice and is discussed below.

ion, and from June to December 1997,<sup>2</sup> Respondent granted benefits to unit employees in order to discourage them from supporting the Union. The benefits alleged by the General Counsel are: (1) across-the-board wage increases in June and December; (2) new televisions and VCR's on tugboats; (3) a new grievance procedure; (4) a 401(k) plan; and (5) five paid holidays. The General Counsel claims that traditional remedies are insufficient to erase the effects of these unfair labor practices and seeks a bargaining order remedy.

For the reasons set forth herein, I find Respondent violated Section 8(a)(1) of the Act by granting an across-the-board wage increase on June 6, by instituting a 401(k) plan and by granting five paid holidays to unit employees. I find the Union achieved majority status as of June 6 and, in view of the seriousness of the unfair labor practices engaged in, I recommend a bargaining order remedy. The remaining allegations of the complaint are without merit, and I recommend their dismissal.

#### FINDINGS OF FACT

##### I. THE PLEADINGS AND RESPONDENT'S MOTION TO STRIKE

In the opening paragraph of the complaint, the General Counsel alleged McAllister Brothers, Inc. as the Respondent in this case. In the answer, filed by counsel representing both McAllister Brothers, Inc. and McAllister Towing & Transportation Company, Inc. (MT&T),<sup>3</sup> counsel referred to both companies collectively as Respondent. At the hearing, the General Counsel adopted the reference to both corporate entities as Respondent.

In paragraphs 1(a) and (b), the General Counsel alleged the filing and service of the charges on Respondent. In the answer, it was admitted that the charges were served by mail upon McAllister Brothers but counsel denied knowledge or information sufficient to form a belief as to the remainder of the allegations. On the first day of the hearing, counsel for Respondent amended the answer and admitted paragraphs 1(a) and (b) in full.

In paragraphs 2(a) and (b), the General Counsel alleged jurisdictional facts as to McAllister Brothers, Inc. In the answer, counsel denied these allegations but averred jurisdictional facts as to MT&T. On the first day of the hearing, counsel amended the answer to admit jurisdictional facts with respect to both McAllister Brothers and MT&T.

In paragraphs 2(c) and (d), the General Counsel alleged that at all material times McAllister Brothers and MT&T constituted a single-integrated enterprise and a single employer within the meaning of the Act. In the answer, counsel denied knowledge or information sufficient to form a belief as to what constitutes "material times" and denied paragraphs 2(c) and 2(d) on this ground alone.

In paragraph 3, the General Counsel alleged that at all material times McAllister Brothers has been an employer engaged in commerce within the meaning of the Act. In the answer, coun-

sel denied knowledge or information sufficient to form a belief as to what constitutes "material times" and denied paragraph 3 on this ground alone. On the first day of the hearing, counsel amended the answer to admit this allegation. Counsel also admitted that MT&T is an employer engaged in commerce within the meaning of the Act.

In paragraph 4, it is alleged that Steven Kress, general manager of McAllister Brothers, Howard Sanborn, senior vice president of MT&T, and Cesare DelGreco, senior vice president of MT&T, are supervisors and agents of Respondent within the meaning of the Act. Prior to the filing of the answer, counsel filed a motion to strike the allegations regarding Sanborn and DelGreco on the ground that neither of these individuals were alleged in the complaint to have committed an unfair labor practice. Respondent then filed its answer denying paragraph 4 on the ground that the entire paragraph was the subject of the pending motion to strike. On April 28, 1999, Associate Chief Administrative Law Judge Joel Biblowitz issued an order denying the motion to strike. Respondent did not thereafter amend its answer until the first day of trial when counsel admitted the supervisory and agency status of Kress, Sanborn, and DelGreco. The amended answer admitted Kress' status "at all material times" as alleged in the complaint. The amended answer admitted Sanborn and DelGreco's status "at material times prior to on or about July 31, 1998."

In paragraph 5, the General Counsel alleged the Union as a statutory labor organization. This allegation was denied in the answer but admitted on the first day of the hearing.<sup>4</sup>

In paragraph 6, it is alleged that in or about May, the Union commenced an organizational campaign amongst Respondent's employees employed on its tugboats operating in and around New York harbor. Respondent denied knowledge or information sufficient to form a belief as to this allegation.

In paragraph 7(a), (b), (c), (d) and (e), it is alleged that on May 30, the Union filed a petition in Case 2-RC-21862, that on July 2, the Board conducted an election, that the Union thereafter filed timely objections to the conduct of the election, that on March 20, 1998, a hearing officer issued a report finding merit to one objection and recommending that a rerun election be conducted, that Respondent filed exceptions to the hearing officer's report, and that on October 21, 1998, the Board denied Respondent's exceptions and directed a second election. Respondent denied knowledge or information sufficient to form a belief with respect to at least some part of each of these paragraphs.

Paragraph 8 of the complaint sets forth the unit that the General Counsel alleges has been at all material times appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act. The unit description in paragraph 8 tracked the unit description in the stipulated election agreement entered into by the parties on June 13. Respondent denied knowledge or information sufficient to form a belief as to what constitutes "material times" and denied paragraph 8 on this ground alone. At the hearing, the parties stipulated to the following appropriate unit consisting of 47 employees:

<sup>4</sup> The labor organization status of the Union was also the subject of pretrial subpoena litigation, discussed *infra*.

<sup>2</sup> All dates are in 1997 unless otherwise indicated.

<sup>3</sup> At the hearing, the General Counsel amended the complaint without objection to change the name McAllister Transportation & Towing, Inc. to the correct name, McAllister Towing & Transportation Company, Inc.

All full-time and regular part-time licensed and unlicensed employees on tugboats operated by Respondent regularly in the Port of New York and vicinity, defined as an area extending north to Yonkers, east to Stepping Stones, and south to the Colregs demarcation line, but excluding all captains, all shore-based and office personnel, and guards, professional employees, and supervisors as defined in the Act.<sup>5</sup>

Paragraphs 9 through 15 relate to the substantive unfair labor practice allegations, all of which were denied in the answer.

On July 28, 1999, the fifth day of hearing, the General Counsel moved to amend the complaint to allege that in or about the third week of June, Respondent, acting through Howard Sanborn, threatened to remove work from the unit and thereby cause unit employees to lose their work in the event they voted for the Union. The motion to amend was granted over Respondent's objection and Respondent filed an answer denying this allegation.

## II. SUBPOENA ISSUES

### A. *Subpoena B-331475*

On April 16, 1999, Respondent served upon the Union subpoena duces tecum B-331475. In paragraph 1 of the subpoena, Respondent sought the production of materials relating to status of the Union as a labor organization. In its petition to revoke, the Union submitted to Administrative Law Judge Steven Davis a copy of a 1985–1988 collective-bargaining agreement between the Union and McAllister Brothers. The Union also submitted the stipulated election agreement in Case 2-RC–21862 signed by Respondent's attorney. Judge Davis granted the petition to revoke paragraph 1 of the subpoena subject to the admission of these documents into evidence. The issue was finally resolved on the first day of hearing when Respondent admitted to the Union's labor organization status.

### B. *Subpoenas B-355566, B-355567 and B-355610*

Subpoena duces tecum B-355566 (27 paragraphs) was received by the custodian of records for MT&T on or about July 2, 1999, and subpoena duces tecum B-355567 (32 paragraphs) was received by the custodian of records for McAllister Brothers on or about that same date. Subpoena duces tecum B-355610 (one paragraph) was received by the custodian of records for McAllister Brothers on or about July 7, 1999. On July 9, 1999, Respondent filed petitions to quash all three subpoenas and on July 12, 1999, the General Counsel filed a response in opposition. Respondent interposed numerous objections to 58 of the 60 paragraphs contained in these three subpoenas including the claim that the subpoenas called for production of "hundreds of thousands of pages of documents stored in numerous locations throughout the world."

On July 13, 1999, the day before the opening of the hearing, I conducted a 90-minute conference call with counsel for all parties. During that call I advised counsel that I would be ruling on the petitions to revoke the following morning. I further

advised counsel for Respondent that I expected him to be in a position to substantially comply with the subpoena at the opening of the hearing inasmuch as Respondent had been served 2 weeks before. I specifically advised counsel that Respondent was not entitled to wait until the petition to revoke was ruled on to begin its search for documents. I pointed out to counsel that petitions to revoke are frequently ruled upon on the first day of trial and that he should be prepared to be in a position to effect substantial compliance.

On July 14, 1999, immediately prior to the commencement of the hearing, I issued an order granting in part and denying in part the motions to quash. At the beginning of the hearing, as a result of the amendments to the answer regarding jurisdiction and the supervisory status of Kress, Sanborn, and DelGreco, the General Counsel withdrew paragraphs M, N, O, and P of B-355566 and paragraphs D, E, F, G, Q, R, S, and T of B-355567. Respondent did not file a petition to revoke paragraph S of B-355566 and paragraph W of B-355567 and produced three pieces of correspondence in response to those two paragraphs.

The General Counsel demanded production of the documents specified in the remaining 46 paragraphs of the subpoenas and Respondent was ordered to comply. Counsel for Respondent stated that at the next break in the proceedings he would consult with his client and would thereafter announce how promptly Respondent would comply, pointing out that it was Respondent's intention to produce the documents "within a reasonable period of time." Respondent's counsel argued that the subpoenas had been served approximately 2 weeks before the opening of the hearing and that "tens of thousands of documents" were sought. He continued "if the notion of a good faith effort to comply with everything that was in Mr. Penny's ridiculous subpoenas would involve realistically producing, gathering, and producing virtually every single piece of paper in the possession of the Respondent, throughout its offices through every file and the notion that we were obligated to do that prior to getting a ruling on the subpoena we think is inappropriate." Counsel made no representation that Respondent had made any effort to locate any of the documents sought in these 46 paragraphs, nor did it produce any documents. Counsel for the General Counsel requested *Bannon Mills*' sanctions be imposed. Specifically, the General Counsel sought permission to adduce secondary evidence, to prohibit Respondent from cross examining General Counsel's witnesses, to prohibit Respondent from rebutting the testimony of General Counsel's witnesses and to have adverse inferences drawn. I granted the application to the extent that I allowed the General Counsel to prove by secondary evidence those issues where there was noncompliance with the subpoenas and I precluded Respondent from rebutting that evidence. I denied the General Counsel's application to restrict Respondent's right of cross examination and I ruled that I would draw only those adverse references that were appropriate.

The discussion of the subpoenaed documents was followed by opening statements. At the conclusion of opening statements, counsel for Respondent represented that during a break, efforts had been made with respect to subpoena compliance and several boxes of documents were expected to be delivered shortly. Counsel further represented that Respondent's files,

<sup>5</sup> This is the same unit description as in the stipulated election agreement with the exception that in the election agreement, the names of seven tugboats were listed.

which were in the hearing room, were also searched and a “number of documents” were located responsive to the subpoena. After the lunch recess, counsel represented that he had obtained a “substantial volume of documents” which he then offered to turn over to the General Counsel. The documents were contained in three litigation size boxes. Counsel for the General Counsel declined to accept the documents, stating that he intended to prove his case under the parameters of the *Bannon Mills*’ sanctions. On July 15, 1999, Respondent filed a request for special permission to appeal the *Bannon Mills*’ ruling. On July 16, 1999, Respondent withdrew the request prior to the General Counsel filing a response.

### C. Subpoena B-355619

The General Counsel sought to introduce 30 authorization cards in support of the complaint allegation that the Union achieved majority status in the unit of 47 employees.<sup>6</sup> In paragraph AA of subpoena B-355567, the General Counsel sought production of the original W-4 forms and job applications of Respondent’s employees for the purpose of authenticating the signatures on the authorization cards. These documents were not produced and fell within the scope of the *Bannon Mills*’ sanction.

At the end of the second day of the hearing, the General Counsel had introduced five authorization cards into evidence. The General Counsel represented that 11 card signers had failed to appear that day pursuant to subpoena. The remaining 14 card signers had not been subpoenaed because, according to the General Counsel, many of them lived throughout the United States and it was logistically difficult to subpoena them and to enforce compliance of those subpoenas if necessary. Counsel for the General Counsel had intended to authenticate these employees’ authorization cards by signature comparison with original W-4 forms and job applications. Respondent’s non-compliance with the subpoena, however, precluded that avenue of proof. Counsel for the General Counsel sought a modification of the *Bannon Mills*’ ruling to the extent that they would accept service of the W-4 forms and the job applications from Respondent. Respondent’s counsel objected, arguing that the General Counsel had opted to request *Bannon Mills*’ sanctions rather than seek subpoena enforcement. He further pointed out that the General Counsel had expressly rejected his previous offer to provide documents after the sanctions had been imposed. I agreed with counsel for Respondent and denied the application to modify the *Bannon Mills*’ ruling in this piecemeal fashion. I found that in making the judgment to seek the sanctions rather than to seek subpoena enforcement, the General Counsel necessarily had to have considered whether available secondary evidence would be sufficient to authenticate the cards and to establish the Union’s majority status. Having made that judgment, and having declined Respondent’s proffer of at least some of the subpoenaed documents the day before, I denied the General Counsel’s application to modify the *Bannon Mills*’ ruling. At the suggestion of counsel for Respondent, I

adjourned the proceedings for the day to allow the parties to discuss a possible resolution of these issues. The parties were not, however, successful in that endeavor.

On July 27, 1999, the fourth day of the hearing, counsel for the General Counsel served on Respondent subpoena B-355619 seeking production of all documents in Respondent’s possession issued by the United States Coast Guard to the 30 employees alleged to have signed cards. The documents, which included United States Merchant Mariner’s documents and Coast Guard licenses, each contained an employee signature. Respondent filed a petition to revoke and the General Counsel filed a response in opposition. On August 2, 1999, I issued an order denying the petition to revoke and directing Respondent to comply with the subpoena on August 6, 1999, the next scheduled hearing date. On August 4, 1999, Respondent filed a request for special permission to appeal that order and the General Counsel filed a response in opposition. On August 6, 1999, the hearing was adjourned pending the decision of the Board on the special appeal and to give the General Counsel sufficient time to seek subpoena enforcement if necessary. On September 10, 1999, the Board denied Respondent’s special appeal and Respondent advised the General Counsel that it would not comply with the subpoena. The General Counsel filed an application for subpoena enforcement in the District Court, Southern District of New York. On September 28, 1999, Judge Loretta A. Preska ordered Respondent to produce the documents on October 12, 1999, the next scheduled hearing date, and stated that any failure of Respondent to obey the court’s order could be punishable as contempt.

On the morning of October 12, 1999, prior to the opening of the hearing, Respondent delivered copies of the subpoenaed documents to the General Counsel. At the start of the proceedings, the General Counsel stated that it appeared that not all of the documents sought in the subpoena had been produced. The General Counsel also pointed out that some of the copies were of poor quality and the employee signatures were not legible. The General Counsel demanded production of the original documents in Respondent’s files and pointed out that at no time had the General Counsel agreed to accept copied documents in lieu of the originals. Counsel for Respondent stated that the originals had not been produced but were “available, now that they have been requested.” When asked why I should not grant the General Counsel’s application to adjourn the proceedings to seek contempt before Judge Preska, counsel for Respondent responded:

Very simply your honor, because we did not know that there was an issue about this. Now that we are told that there is an issue about certain signatures or certain copies, if we are told what the issue is, we will readily resolve the issue in one of two ways, I suppose. One way would be to present—to see if the best available copy could improve it, which we are happy to endeavor and try to compare them to do, we can do that this morning, or alternatively, to look at that best available copy and see that it is no better. In other words, now that we see there is an issue about legibility, we are happy to resolve it right now. If we see what the issue is.

<sup>6</sup> The General Counsel introduced two cards signed by the same employee bringing the total number of authorization cards introduced to 31. Because an employee cannot be counted twice, I will analyze the issue of majority status on the basis of 30 authorization cards.

In an effort to avoid further district court proceedings, I ordered counsel for all parties to go to Respondent's facility in Staten Island where the original documents were located and to observe the retrieval of the original documents from Respondent's files. They were then directed to return to the hearing room with those documents. I asked counsel for Respondent if he would comply with my order, pointing out that in the absence of compliance, I would grant the General Counsel's application for an adjournment to initiate contempt proceedings. Counsel for Respondent agreed to comply with my order.

At 4 p.m. that afternoon the parties returned and the General Counsel represented that in the course of the document retrieval, additional Coast Guard documents had been located in the employees' personnel files. Counsel for Respondent stated that the missing documents were the result of inadvertent errors in copying. Counsel for the General Counsel stated that they intended to seek appropriate sanctions for the withholding of documents and counsel for the Union requested that Respondent's counsel be summarily excluded from the hearing for misconduct. The application to remove counsel from the hearing was denied.

An examination of the additional documents retrieved from Respondent's files that afternoon revealed 20 signature-bearing Coast Guard documents relating to 11 card-signing employees. Of those 11 employees, 8 did not testify in this case and the General Counsel sought introduction of their authorization cards by signature comparison. In the case of one employee, Paul Sarmiento, Respondent had not produced any Coast Guard document earlier in the day. It was only after the retrieval process was conducted that afternoon that a signature-bearing Coast Guard document was produced.

### III. ALLEGED UNFAIR LABOR PRACTICES

#### A. Corporate Structure

McAllister Brothers is a domestic corporation with offices on Staten Island (the Staten Island yard). McAllister Brothers is engaged in the business of interstate marine towing and transportation and maintains tugboat operations in New York harbor, the South Atlantic, the Gulf of Mexico, the Caribbean and South America.

MT&T is a domestic corporation with offices at 17 Battery Place, New York, New York. MT&T is engaged in the business of interstate marine towing and transportation. Prior to August 1998, McAllister Brothers was the largest tugboat division of MT&T.

Prior to August 1998, the owners of MT&T were Bill Kallop and Brian McAllister. The corporate officers of MT&T were Bill Kallop, president and chief executive officer, Brian McAllister, chairman, Larry Chan, chief financial officer, Beverly Reilly, treasurer, and Richard Levine, court appointed custodian. Howard Sanborn was senior vice president in charge of sales and Steven Kress was general manager. At the same time, Kallop was president and chief executive officer of McAllister Brothers, and Kress was general manager.

Kress was responsible for the day-to-day operation of McAllister Brothers worldwide and reported to Sanborn. Sanborn oversaw all of MT&T's tug and barge divisions, in-

cluding McAllister Brothers, and reported to Kallop. Sanborn and Kress both had offices in the Staten Island yard and they were in frequent, almost daily contact. They discussed and made decisions about wages and benefits for the employees of McAllister Brothers. Simon Young was employed by MT&T as marine personnel manager and performed services for McAllister Brothers' employees. He interviewed job applicants, conducted orientation sessions for new employees, and ensured that the boats were properly crewed as per Coast Guard regulations. Payroll services and employee benefit plans for McAllister Brothers were administered by MT&T employees at 17 Battery Place. As treasurer of MT&T, Reilly was in charge of finance, insurance and administration including human resources and benefits. She performed these services for all of MT&T's affiliates including McAllister Brothers.

Following protracted litigation between Kallop and Brian McAllister, the assets and subsidiaries of MT&T were split up in August 1998. Brian McAllister became the sole owner of MT&T and McAllister Brothers was merged into MT&T. MT&T continued to operate all but two of the tugboats that had previously been operated by McAllister Brothers. Kress became a vice president of MT&T and continued as general manager. Young continued to perform personnel services for the tugboat employees and payroll services and employee benefit plans continued to be administered by MT&T employees. Reilly remained in charge of human resource matters.

#### B. Union Organizing Effort

Lance Torressen is chairman of the Union's executive board, delegate at large and hiring hall agent. Torressen testified that he first met Ronald Rosenbrock in or about December 1996 when Rosenbrock came to the union hiring hall and expressed an interest in becoming a seaman. Torressen registered Rosenbrock, but explained to him that it was difficult to ship out someone like himself who had no experience. Torressen suggested Rosenbrock gain some experience in the industry.

Rosenbrock was hired by Respondent in March and he worked as a deckhand assigned primarily to the Justine. In or about April or May, Rosenbrock returned to the Union hall, advised Torressen that he now had some work experience and inquired about getting another job with better working conditions. Rosenbrock expressed his dissatisfaction with the pay, benefits and working conditions at Respondent and Torressen suggested that if pledge cards were signed, union representation could lead to improved conditions. Rosenbrock agreed to distribute cards and Torressen gave him a supply.<sup>7</sup> Torressen instructed Rosenbrock to tell employees their benefits and working conditions would improve with the Union and if a

<sup>7</sup> The preprinted portion of these cards read as follows:

I, \_\_\_\_\_, hereby make application for membership in the LOCAL [blank] UNITED MARINE DIVISION, I.L.A.—A.F.L.—C.I.O. As a consideration for my membership I agree to abide by the constitution and by-laws of the LOCAL [blank] UNITED MARINE DIVISION, I.L.A.—A.F.L.—C.I.O., as currently in force and as amended from time to time. I also hereby authorize the said LOCAL [blank] UNITED MARINE DIVISION, I.L.A.—A.F.L.—C.I.O. to represent me as my collective bargaining agent in all matters pertaining to wages, hours and working conditions.

ratified contract was reached, all initiation fees would be waived and anyone who was a former member of the Union would be forgiven any back dues owed.

Rosenbrock testified in May he distributed approximately 50 authorization cards to employees and told them if they signed the cards they could have union representation to obtain better benefits and better pay. He spoke to most of the employees on an individual basis and he observed some of them sign cards. Rosenbrock returned the signed cards he received to the Union hall. He was not aware of any one else distributing authorization cards.

Torressen testified that Rosenbrock returned signed and dated authorization cards to him in the Union office, but did not specify the date when this occurred. Torressen followed the Union's standard procedure of examining the cards and giving them to Jay Dady, the Union's secretary treasurer.

Dady testified that he has been involved in five organizing drives for the Union and is familiar with the Union's procedures for handling authorization cards. When signed cards come into the hall by mail, the secretary places them in Dady's mail slot. Dady examines the cards and puts them in a file marked "election." That file is placed in a larger file marked with the name of the company being organized. The entire file is kept in a file cabinet in the office manager's office. If cards are hand delivered, the receiving official turns them over to Dady and he follows the same examination and filing procedures. Dady keeps the president of the Union apprised of the number of signed cards and when the president feels there is a majority, a petition is filed with the Board.

Dady testified in this case there was a "McAllister file" and inside that file was a separate folder marked "McAllister election" in which the signed authorization cards were maintained. On May 30, the petition was filed and 24 authorization cards were date-stamped received by the regional office. The petition was faxed to Respondent the same day. On June 9, an additional 7 cards were date-stamped received by the regional office.

Dady was shown 29 of the 30 authorization cards received in evidence. On all but one of the cards he was shown, the pre-printed portion left the local number of the Union blank. Dady testified before he gave the cards to Torressen in May, he filled in "333" for the name of the local Union. He believed he filled in all of the cards, but it was possible that he missed a few. Dady denied filling in "333" after he received the signed cards back from employees.

On May 28, the Union addressed a letter to employees who signed authorization cards. In that letter, the Union made the following statement:

Also, if Local 333 wins the election and a contract is obtained, Local 333 will give all employees membership cards without the paying of any initiation fee. Just the monthly dues will be charged. This offer applies to employees that will be eligible to vote. If any employee member is in arrears on his dues he will not be charged back dues. All will start on the day that the contract is signed.

On June 12, Respondent and the Union entered into a stipulated election agreement and agreed upon a unit that excluded

full-time captains.<sup>8</sup> Employees who worked fifty percent of the time or less as captains were included in the unit.

### C. Authorization Cards

#### 1. Cards introduced through witness testimony

Charles Cassar identified an authorization card signed by him on May 7. He was not certain if the local Union number "333" was written on the card when he signed it, but he was certain that he did not write the number. Cassar testified that he read the card before he signed it. He overheard others say that initiation fees would be waived. On cross examination he testified that he understood the only purpose for signing the card was to get a vote for the Union but on redirect by the General Counsel, he conceded that no one specifically told him this, he had overheard it in conversations. Cassar was still employed by Respondent at the time of the hearing.

Martin Clancy identified an authorization card signed by him on May 18. He was not certain if the local Union number "333" was written on the card when he signed it, but he was certain that he did not write the number. He could not recall if he read the card before he signed it. He acknowledged that he knew the Union represents employees in the tugboat industry and that he was familiar with the Union when he signed the card. He further acknowledged he knew the card was a pledge card, but denied he knew it was a pledge card when he signed it. Nevertheless, he conceded he read the card to a sufficient degree to print his name, sign his name, enter the date, enter his address and enter his job classification in the appropriate spaces. Clancy was still employed by Respondent at the time of the hearing.

Frank D'Amelio identified an authorization card signed by him on May 18. D'Amelio testified he heard something about an initiation fee being waived but he could not recall if he heard this before the election or from whom he heard it. He also heard if an employee had previously been a member of the Union he would not have to pay back dues, but again he did not know from whom he heard that information.

Neal Decker was employed in May on the Hinton. He identified an authorization card signed by him on May 23. He did not write the numbers "333" on the card and could not recall if the numbers were on the card when he signed it. He knew, however, at the time he signed the card he was signing it for Local 333.

Drew Feuer identified an authorization card signed by him on May 7. He could not recall if the numbers "333" were on the card at the time he signed it. Feuer testified he witnessed Luis Hernandez and Brian Sutton each sign a card that same day. He also witnessed Dragoljub Djokic sign a card on May 18.

Paul Geosits identified an authorization card signed by him on May 19. He testified he read the card before he signed it.

Dean Kinnier identified an authorization card signed by him on May 15. Although he was not certain if the numbers "333" appeared on the card before he signed it, he was aware the card was for Local 333. He read the card before he signed it and

<sup>8</sup> It is not alleged by any party in this proceeding that full-time captains are statutory supervisors.

understood what he read. When fellow employee Chris Williams handed him the card, Williams said it was a pledge card for the Union and if Kinnier wanted to sign it he should sign it. Dean Kinnier was still employed by Respondent at the time of the hearing.

Patrick Kinnier identified an authorization card signed by him on May 21. Although he was not certain if the numbers "333" appeared on the card before he signed it, he was aware the card was for Local 333. He read the card before he signed it and understood it. Patrick Kinnier was still employed by Respondent at the time of the hearing.

John Ligouri identified an authorization card signed by him on May 25. He read the card before he signed it and understood it. Ligouri was still employed by Respondent at the time of the hearing.

Michael Morgan identified an authorization card signed by him on May 5. Although he was not certain if the numbers "333" appeared on the card before he signed it, he was aware the card was for Local 333. He read the card before he signed it and understood it. Morgan was still employed by Respondent at the time of the hearing.

Jeffrey Moulton identified an authorization card signed by him on May 18. Although he was not certain if the numbers "333" appeared on the card before he signed it, he was aware the card was for Local 333. He read the card before he signed it. Prior to signing the card, Moulton heard rumors that employees would not have to pay money to the Union at least initially. When he signed the card he understood an election would be part of the process, and he further understood by signing the card he was applying to become a member of the Union. He testified it was not fair to say the reason he signed the card was in order to have an election. Moulton was still employed by Respondent at the time of the hearing.

Ronald Rosenbrock identified an authorization card signed by him on May 18.

Michael Smith identified an authorization card on which he had printed his name, address and job classification. He testified he signed the card but he could not recall the date on which he signed it. He could not recall if he signed the card before or after the election and he testified the date written on the card, May 15, did not appear to be his handwriting. The card bears a date/time stamp "Received May 30, Second Region, New York, N.Y. NLRB." Smith was still employed by Respondent at the time of the hearing.

William Lani Wong testified in May he was employed as a mate on the Bruce McAllister. Wong has worked for Respondent off and on for the past 19 years. He testified the last time he worked on a Union job was in 1988 when the Union struck Respondent. Wong identified an authorization card he signed on May 15. On the back of the card, Wong wrote, "initiation and back dues waived." He testified the gossip was that initiation and back dues would be waived if he rejoined the Union, but he denied this was the reason he signed the card. It was his understanding signing the card would just allow the Union to come in. He also understood that employees would be given the chance to vote either way in an election.

Adam Worrell testified in May he was employed as an ordinary seaman on the Hinton. He identified an authorization card he signed on May 23.

Celso Zuniga testified in May and June he was employed as a deckhand on the Hinton. He identified two authorization cards. He signed the first card on May 6 in the Union hall. He testified he had gone to the Union hiring hall to register for work and he was told by someone there if he signed the card and paid \$1100 or \$1200 to the Union in fees, the Union would find him a job. He testified this was the reason he signed the card. The second card Zuniga signed was on May 17. Zuniga testified he had been given the card by Chris Williams and he read it but did not really understand it as Spanish is his first language. Zuniga was still employed by Respondent at the time of the hearing.

## 2. Signature comparison cards

The General Counsel introduced an authorization card dated May 23, signed by David Belasco. Respondent's personnel file for this employee contains a Coast Guard license and a Merchant Mariner's document both bearing the same signature as appears on the authorization card.

The General Counsel introduced an authorization card dated May 21, signed by Thomas Gaede. Respondent's personnel file for this employee contains two Coast Guard licenses both bearing the same signature as appears on the authorization card.

The General Counsel introduced an authorization card dated May 10, signed by James Hitchcock. Respondent's personnel file for this employee contains two Merchant Mariner's documents both bearing the same signature as appears on the authorization card.

The General Counsel introduced an authorization card dated June 2, signed by John Horst. The card is date stamped received by Region 2 on June 9.<sup>9</sup> Respondent's personnel file for this employee contains a Coast Guard license and a Merchant Mariner's document both bearing the same signature as appears on the authorization card.

The General Counsel introduced an authorization card dated May 7, signed by Alvin Moe. Respondent's personnel file for this employee contains two Merchant Mariner's documents both bearing the same signature as appears on the authorization card.

The General Counsel introduced an authorization card dated May 29, signed by Patrick Riordan. Respondent's personnel file for this employee contains a Merchant Mariner's document bearing the same signature as appears on the authorization card.

The General Counsel introduced an authorization card dated May 22, signed by Paul Sarmento. Respondent's personnel file for this employee contains a Merchant Mariner's document bearing the same signature as appears on the authorization card.

The General Counsel introduced an authorization card dated May 7, signed by Jeffrey Tizzano. On the reverse side of the card the following handwritten notation appears: "No iniation [sic], No back dues, John Healy, Lance Torressen (delegates)." In addition, the name, address and telephone number of Local

<sup>9</sup> Although the date stamp is lightly printed, it is nevertheless discernable.

333 were written. Respondent's personnel file for this employee contains a Merchant Mariner's document with the same signature as appears on the authorization card.

The General Counsel introduced an authorization card dated April 30, signed by Gregorio Velasco. Respondent's personnel file for this employee contains a Coast Guard license and a Merchant Mariner's document both bearing the same signature as appears on the authorization card.

The General Counsel introduced an authorization card dated May 17, signed by Hillis Edward Waddell Jr. Respondent's personnel file for this employee contains a Merchant Mariner's document with a partially legible signature. The first name "Hillis" and the letters "Edw" of the middle name appear on the Merchant Mariner's document and this portion of the signature is the same as the corresponding portion on the authorization card.

The General Counsel introduced an authorization card dated May 12, signed by Christopher Williams. Williams served as the Union observer at the election and his signature appears on the certification on conduct of election form. The signature on the form is the same as on the authorization card.

#### *D. Wages*

##### 1. January increase

Sanborn testified in late December 1996, just prior to the Christmas holidays, Kress advised him McAllister Brothers was losing employees to other companies and Kress wanted to bring wage levels up to par with the wages paid by competitors. He requested a \$10 per day across-the-board wage increase effective January 1, and Sanborn approved the increase. According to Sanborn, the two agreed to look at the wage issue again in 6 months. Sanborn denied he agreed to a total dollar figure for future wage increases and he denied committing the company to any future wage increase.

Counsel for the General Counsel called Kress as a witness and cross-examined him under Section 611(c). During the course of that examination, the General Counsel elicited the following information regarding the January increase:

Q: In fact, it was you who had gone to Mr. Sanborn to instigate this conversation regarding crew wage rates. Correct?

A: Correct.

Q: And, you went to him because, at the time of that conversation, McAllister was experiencing a severe problem of crew turnover. Correct?

A: Correct.

Q: Around this time, crewmembers at McAllister were coming to the company for training, and then leaving to go to other companies. Correct?

A: Correct.

Q: Now, it was your intention, at the time of this conversation, to attempt to retain these employees by bringing their wages up. Correct?

A: Correct.

Q: And you knew at this time crewmembers were leaving to go [to] other companies in and around the Port of

New York that were offering higher wages for the same work. Correct?

A: I'd assumed that, yes.

Q: Well, you knew, for instance, that in New York harbor, the majority of the companies operating tug boats had Union contracts. Correct?

A: Yes, I—yes, I did.

Q: And the majority of these companies with Union contracts were offering higher wages than McAllister. Correct?

A: That's correct.

Q: Is it fair to say that, at the time you went to see Mr. Sanborn, in or around November 11, 1996, it was your intention to try to stop this crew turnover that was taking place, through raising wages. Correct?

A: That's correct.

On January 8, 1997, Kress wrote a memo to the payroll department stating the increase would be effective January 6, 1997. The memo reflected the new rates of pay that ranged from \$95 per day to \$150 per day.

##### 2. June increase

The petition was filed by the Union on May 30. Sanborn testified about a week later he made the decision to implement a \$15 per day across-the-board wage increase retroactive to June 1. A memo implementing the increase was dated June 6. Sanborn was asked his reasons for making the decision:

Well, there was a lot of pressure on us to make sure this election was a favorable outcome to—for us. And at the time, with this stockholder dispute, which was very upsetting to us all, the—we sort of looked at it that our jobs were in jeopardy, in particular Steve Kress, if we didn't win this election. Now, saying that, I would say to you that when Steve Kress came to me in December of '96 and asked for that increase, and I granted it, and we were going to look at it again in 6 months, that would have taken us to July 1st, and the election was July 2nd, and it would have looked very bad. So, we sort of moved it up a little bit, and I think we were a little overanxious in doing that, because of the strain on us, in particular Kress, that Brian McAllister called me to ask for his termination over this election.

Prior to his employment with Respondent, Simon Young was employed in the tugboat industry as a deckhand and was a member of the Union. Young testified when he was hired as the maritime personnel manager in May, he was told the reason he was being brought in was to find out why Respondent had such a high rate of employee turnover. Within the first several days of his employment, Kress asked Young for his opinion. Young responded: "I told him, I said I looked through our files, looked through the personnel files and saw what the guys were making and I said that's your problem, the low pay. When I was working for Marina, I was making probably \$30 more than what these guys were." Kress told Young raises had been given in January and there would be additional raises in \$5 to \$10 increments about every 6 months to level the playing field. Kress also told him there were other benefits they were looking

into but he did give specifics. Kress did not specifically mention an increase might be given in June.

Rosenbrock testified when he first started working for Respondent in March, he was paid \$80 per day plus \$5 per day in lieu of pension benefits. He was told by Jean Floccari, the personnel manager who preceded Young, that after 3 months employment he would possibly be evaluated and receive a \$10 per day merit increase. In his paycheck dated June 13, covering the payroll period ending June 8, Rosenbrock was paid at three different rates: one day at \$80 per day, 1-1/2 days at \$90 per day and 4-1/2 days at \$105 per day. He continued to be paid \$5 per day in lieu of pension benefits. Rosenbrock testified it was his understanding the \$10 increase from \$80 to \$90 was the merit increase referred to by Floccari. The \$15 increase from \$90 to \$105 was the across-the-board increase given to all deckhands.

In or about the week before the election, in late June, Dady visited one of the tugboats. He identified himself and spoke with several deckhands and the engineer about why they should vote for the Union. The engineer said he had already gotten a wage increase and he was not going to put it in jeopardy by talking to Dady. The employees walked away and Dady left the boat.

On June 23, 1997, the Union addressed a letter to employees setting forth the wage rates for mates, engineers and deckhands represented by the Union in the harbor: mates and engineers, \$258 per day plus overtime; deckhands/AB \$158 per day plus overtime; and, O.S., \$152 per day plus overtime. The letter stated many captains covered by the Union contract received over \$300 per day, and that all of these wage rates "are being increased by 9 to 10% plus, compounding." After the June increase, the new rates of pay for Respondent's engineers ranged from \$195 to \$205 per day. The rates for deckhands ranged from \$100 to \$150 per day and the rates for captains ranged from \$220 to \$240 per day.

### 3. December increase

According to Sanborn, after granting the increase in June, he told Kress he would look at the wage level issue again in 6 months. He denied authorizing any future increase at that time, committing only to revisit the issue in 6 months. In December, Kress asked Sanborn if they could "implement the 6-month increase." Sanborn testified 1997 had been a good revenue year and he approved a \$10 across-the-board increase effective January 1, 1998.

### 4. Kress' file memo

On October 7, 1998, the post election hearing on objections commenced. Sanborn testified the day before, he and Kress had a conversation during which they attempted to refresh their recollections on the events that had led up to the wage increases and the events prior to the election. Kress showed Sanborn a file memo he had written outlining their December 1996 conversation. The typewritten portion of the memo read:

To: File  
From: Steven J. Kress  
Date: November 11, 1996

Met with Howard this morning to discuss turnover rate of crew personnel. Wages primary cause. Decision to slowly increase base wage structure made, deckhands first, all crew second. First adjustment for deckhands target date December 1996, six months later all crew, six months later deckhands again and so on until parity with other operators achieved. Amounts of adjustments dependent on amount of business in preceding months. Initial increase \$10.00 per day.

Below the typewritten portion of the memo, the following handwritten notations appeared:

1/6/97 Deckhands to go up 35 per diem (avg. 130-140) Capt, Mates, Eng up 15 per diem  
5/13/97 15 per diem increase 6/1  
5/28/97 Union vote, continue with pay increase scheduled  
11/19/97 10 per diem 12/1 Deckhands new start rate 110 per day + 10 after 60 days

Kress testified he typed the memo on November 11, 1996, the same day as his conversation with Kress, and placed the memo in a labor file located in his desk drawer. He thereafter made the handwritten entries on the dates indicated. He testified each date corresponded with a conversation he had with Sanborn on or about that same day. The January 6 entry reflects Sanborn's decision to effect a total increase of \$35 per day by the end of the year. The May 13 entry reflects Sanborn's authorization to implement the June 1 increase on or about May 13. The May 28 entry reflects Sanborn's directive to leave things as they were until someone told them differently and the November 19 entry reflects Sanborn's approval of the \$10 raise effective December 1. As to this last entry, Kress admitted that in a sworn pretrial affidavit, he stated he had not discussed the amount of the December 1 increase with Sanborn because Sanborn had previously approved a year-end total raise amount of \$35. Elsewhere in his testimony, Kress stated as of January 6, Sanborn had not given authorization for the June and December increases. Finally, Kress testified the company had never previously given three across-the-board wage increases in 1 year.

When he was shown a copy of Kress' memo on the witness stand, Sanborn testified he remembered having seen the typewritten portion of the memo during his conversation with Kress but he did not remember having ever seen the handwritten portion. As for the typewritten portion dated November 11, 1996, Sanborn's recollection was Kress first came to him about a wage increase in late December 1996. As for the handwritten entry dated January 6, Sanborn did not recall ever having had a discussion with Kress in which he had agreed to an overall increase of \$35 per day. Sanborn denied having had a conversation with Kress on May 13 regarding the June 1 increase, and he denied having had a conversation on May 28 regarding the Union vote. Sanborn recalled discussing the January 1, 1998 increase with Kress in December, not on November 19 as written in the memo.

*E. Sunday, June 22: First Employee Meeting*

Roy Trepasso was employed by Respondent from January 1992 to December 1998 at which time he was terminated.<sup>10</sup> In May and June, Trepasso worked as a captain on the Brooks and was not eligible to vote. He testified he observed Union authorization cards being circulating at around that time and he spoke with several employees about the Union and about signing cards. He could not, however, recall whether he signed a card.

Trepasso testified in the 2 months prior to the election, at the same time as the Union organizing effort was taking place, lists of demands were prepared and circulated by employees. One of these lists called for Kress' termination and Trepasso testified several employees told him management suspected him of preparing that particular list. Trepasso denied he was the author, but felt since he was already being singled out by management, he would meet with employees and create a "reasonable" list of demands.

On Sunday, June 22, employees met on the dock to discuss the types of benefits they were interested in obtaining. Four witnesses testified regarding this meeting, and their estimates of the number of employees in attendance varied from 4 to 20. Trepasso testified the meeting had nothing to do with the Union and there was no discussion about whether to vote for the Union in the upcoming election. Following the discussion, Trepasso prepared a handwritten list of demands which referenced the following items: five paid holidays, a 401(k) plan, 2 weeks paid vacation, an across-the-board wage increase of \$25, the creation of a grievance committee, and time and a half overtime pay for work in excess of 12 hours in a day. Trepasso testified he consulted with two veteran employees, Captains Kelly and Dunne, about the list of demands and he asked Captain Kelly to give the list to Kress.

James Litrell, a deckhand, testified sometime between his first day of employment on June 18 and the date of the election on July 2, he attended a meeting with other employees. No Union representative was present, nor was anyone from management present. The employees talked about the benefits they would like to see coming out of the election. They discussed getting five paid holidays, a 401(k) plan and higher wages for more experienced employees. They also discussed the fact that captains were able to terminate employees and they wanted a committee consisting of a captain, a first mate and an engineer to make those decisions. Litrell testified that one deckhand appeared to be in charge of the meeting and took notes. At the end of the meeting, this person said he was going to relay the information to the company.

Dean Kinnier testified 2 to 3 weeks before the election he attended a dockside meeting at which Trepasso was present. During the course of the meeting, Trepasso drew up a list of demands. Kinnier saw Trepasso leave the meeting at some point and enter the office. Trepasso returned to the meeting and said "the stuff that we were looking for was in the works." According to Kinnier, Trepasso did not say anything about management tying up the boats in New York.

<sup>10</sup> The circumstances of Trepasso's termination are discussed in the credibility portion of this decision.

Jeffrey Moulton testified he attended a meeting of employees at which Trepasso was present. He did not recall him saying the company had threatened to remove boats from New York harbor.

*F. Kress and Sanborn Discuss the Employee List of Demands*

Sanborn testified in mid-June, Kress showed him a letter he had received from captain Bill Kelly. Kress said the crewmembers had held a meeting and prepared this list of demands. The next day, Kress showed him another letter from an engineer. Sanborn told Kress to forward the letters to the company's attorneys and to keep copies. Sanborn never saw either document again. He recalled the letters included a demand for across-the-board wage increases every 6 months, a 401(k) plan, paid holidays and a grievance committee. There was also mention of installing VCR's and air conditioning on the boats. Sanborn and Kress discussed the fact they considered the demands reasonable and could be probably be accommodated over a period of time, perhaps a year. Sanborn testified he spoke with several captains and dispatchers (non bargaining unit members) and told them the employees' demands were reasonable and the company could probably meet most of them. He told them that if the company and the employees could work it out, and if the company could avoid losing the election, in another year the employees could have another election if they were not satisfied. Sanborn assumed the captains and the dispatchers conveyed his message to the crewmembers, although no witness testified to that fact.<sup>11</sup>

*G. June 28: Trepasso's Meeting With Kress*

Trepasso testified on Friday evening, June 27, he was in the wheelhouse of the Brooks when he received radio notification he should report to the office at 9 a.m. the following morning to meet with Kress and Sanborn.

On the morning of Saturday, June 28, Trepasso met alone with Kress in his office at around 9 a.m. Trepasso had in his possession a second handwritten list of demands which he had prepared. Trepasso testified the only difference between this second list and the earlier list he had given to Captain Kelly was that there was no reference in the second list to paid vacation and overtime. According to Trepasso, Kress began the meeting by accusing Trepasso of having written the letter calling for his termination. Trepasso testified he responded as follows:

I told Mr. Kress that that really wasn't the issue that I was there for. Basically, I had a list of demands, so to speak, not demands, but what the gentlemen were interested in, the reason why they wanted the Union in, in the house. And it contained several, I guess you'd call it demands.

. . . Well, again, I'm going to go back to—the initial discussion was about this other letter, which I had nothing to do with, and I said to Mr. Kress, 'You know, I don't know what the witch hunt is about, but I had nothing to do with it. I'm here for another reason,' at which point I handed him the list

<sup>11</sup> These statements are not alleged in the complaint as an unfair labor practice.

of requests. I said that this is what I'm here for. This is what the guys want. Steve said to me, 'What do I have to do to get a no vote here?' And I said, 'Well, this is the list. These are the gripes. These are what the guys want, and this is why they want the Union in here, because they feel that the Union is going to offer them these things.'

According to Trepasso, he and Kress then went down the list, discussing each of the items listed. With respect to the demand for five paid holidays, Kress said he did not have authority to provide five paid holidays a year but he was in the process of sending a request to his superiors at 17 Battery Place. With respect to the demand for a 401(k) plan, Trepasso testified at the time of this conversation, only captains were eligible to participate and the demand was for all crewmembers to be able to participate. Trepasso testified, "[Kress] said to me, 'Believe it or not, I've been working on that a long time. That's my intention, to give everybody the 401(k).'"

With respect to the demand for a \$25 across-the-board wage increase, Trepasso testified Kress said everyone, including captains, mates, deckhands and engineers, was going to get an immediate raise. Trepasso could not recall if Kress said the raise would be \$15 or \$25. In addition, Kress said every 6 months, evaluation sheets were going to be filled out by each captain to see if employees were entitled to a raise based on performance.

With respect to the demand for the establishment of a grievance committee, Trepasso testified Kress said a committee was already in place and he mentioned the names of employees Pat Kinnier, Bill Kelly and Bo Harris. Trepasso testified he had never heard of such a committee prior to his conversation with Kress, and to his knowledge, no grievance committee existed before or after this conversation with Kress.

Trepasso testified the last item on the list was a demand for 2 weeks paid vacation. Kress told him he was shooting too high and employees would never get this benefit.

Kress was called as a witness by both the General Counsel and Respondent and neither side questioned him about this meeting with Trepasso.

#### *H. June 28: Trepasso's Meeting With Sanborn*

According to Trepasso, at the conclusion of this meeting with Kress, Kress directed him to report to Sanborn's office. Trepasso proceeded to meet with Sanborn, alone, in Sanborn's office. Sanborn opened the door, extended his hand, introduced himself and stated, "Mr. Trepasso, I presume? I've heard a lot about you. My father told me something a long time ago, and that's 'stay close to your friends and stay even closer to your enemies.'" Trepasso responded, "What does that make us?" and Sanborn allegedly replied, "I don't know. Let's sit down and talk and we'll find out."

Trepasso testified Sanborn then made the following statement:

I have the authority—I want you to know that I have the authority to pull every tug out of this harbor if I have to, and I'm prepared to do so. And I want you to go out and tell everybody, spread the word, that if the Union comes in here and we get a yes vote, that I will take every

boat out of New York harbor and locate it somewhere else. Have a nice day.

Trepasso testified when he left Sanborn's office, approximately 15 employees were waiting for him outside and he repeated, word for word, his conversations with both Kress and Sanborn. Of the 15 employees, Trepasso could remember the names of only two: Chris Williams and Mike Smith. Both Williams and Smith were called as witnesses by the General Counsel, but neither was asked about this exchange with Trepasso.

According to Sanborn, there had been rumors Trepasso was the crewmember leading the charge for the Union and it had gotten back to Trepasso that management knew it was him. It was Trepasso who requested to meet with Kress and with Sanborn, not the other way around. On the day of the meeting, the dispatcher called Sanborn and said Trepasso wanted to speak with him. Sanborn told the dispatcher to direct Trepasso to his office. Trepasso arrived and the two shook hands. Trepasso began the conversation by denying he was the one pushing for the Union and Sanborn replied they had been disappointed by the rumors about him but he had heard Trepasso was a good captain. Trepasso repeated he had not had anything to do with the Union. Trepasso asked Sanborn if he could be assigned to the Goose, a large-sized tug that had been brought to New York to do oil towing, which assignment would enable him to earn more money. Sanborn said he would have to speak to Kress about that. Trepasso asked if other large-sized tugs would be coming in to the harbor and Sanborn said not at that time. Sanborn said there was an election pending, and the possibility of negotiations, so they would have to wait for the outcome before increasing the size of the fleet. Sanborn could not recall whether he mentioned to Trepasso during this meeting that in the course of the 1988 strike the company had reduced the number of tugboats from 15 to 5. He also could not recall if he said to him the company would not be bringing any more tugs into New York if there was an unfavorable contract or a hostile environment. Sanborn acknowledged making such statements in the period prior to the election to others, but he could not recall if he made these statements to Trepasso. He did tell Trepasso the company was happy with the way things were without the Union. Sanborn denied ever stating to Trepasso if there was a yes vote he would pull all of the boats out of New York harbor.

#### *I. Sunday, June 29: Second Employee Meeting*

On the Sunday following his meetings with Kress and Sanborn, Trepasso conducted a second meeting of employees on the dock. He testified he again relayed the substance of Kress and Sanborn's remarks including Sanborn's statement about taking the boats out of New York harbor. Approximately 30 to 35 employees were present, of whom 15 were the same employees whom Trepasso had addressed on June 22, immediately following his meeting with Sanborn. Thus, according to Trepasso, a total of 30 to 35 employees were told of Kress and Sanborn's remarks.

Steve Schulman is a deckhand who testified a week or 2 before the election he attended an impromptu meeting of employees on the dock. He recalled approximately seven or eight

employees attended. The only employee whose name he could recall was Trepasso. There was a general discussion about the pros and cons of the Union. Trepasso did not say anything about Respondent pulling boats out of the harbor.<sup>12</sup>

Jeffrey Moulton testified he attended this second meeting. He recalled Trepasso being present but did not recall him saying the company had threatened to remove boats from New York harbor.

#### *J. The 401(k) Plan*

Prior to October 1996, MT&T maintained a 401(k) plan for management personnel. On October 4, 1996, the plan was extended to captains and on July 8, 6 days after the election, Respondent announced extension of the plan to crewmembers. On direct examination, Sanborn testified the first time he considered extending the plan to crewmembers was when he and Kress reviewed the employee demand letters in June. Sanborn's comment to Kress was that all of the demands appeared reasonable and "doable," but there was no specific discussion about the 401(k) plan. It was not until after the election that Sanborn and Kress first discussed the matter in any detail. At another point in his testimony, Sanborn stated sometime in June he obtained a copy of a competitor's collective bargaining agreement and he observed the contract provided for a 401(k) plan.

Sanborn was questioned at length on cross examination about the timing of the decision to extend the plan to crewmembers.

Q: You don't know the exact date that the 401(k) plan was extended to the captains. Correct?

A: No.

Q: But, you know that it was on a date earlier than July 8, 1997. Correct?

A: Again, I don't know that.

Q: You don't know one way or the other?

A: No.

Q: Okay. But, you remember having discussions with Steve Kress over a period of months, about extending the 401(k) plan to crewmembers other than captains. Didn't you?

A: That's probably right, yeah.

Q: And, you had discussions with people at 17 Battery Place for several months over the question of extending the 401(k) plan to crewmembers other than captains. Isn't that true?

A: No, I don't—I didn't have discussions with that—with anyone in New York about that.

Q: So, you didn't authorize the 401(k) plan for anyone. Did you?

A: No. The administrative challenges were—when those hurdles were cleared, Steve Kress just came to me and said, "We're issuing the 401(k)." And, I just signed off on it.

Q: And, when you say "the administrative hurdles," do you mean things relating to the plan administration, and the amendment of the plan, and things of that nature?

A: Whatever we had to go through Beverly [Reilly] or Nancy [Errichello] for.

Q: Okay. And, that took a period of months to accomplish. Correct?

A: Correct.

Following his testimony that it took several months for the plan to be extended to crewmembers, Sanborn continued:

JUDGE KERN: What I'm not clear about is there was the demand—prior to the demand letter, where there was a mention of a 401(k), had you ever had any conversations or had you undertaken any study to extend the 401(k) to the crewmembers?

A: I don't really recall talking much about the 401(k) to crewmembers. It's possible I did that, when Steve came down in December of '96 to talk to me about the wages, but I don't recall it. Because, at the time, I didn't think we could give it to them.

JUDGE KERN: [A]t some point, Ms. Reilly and Ms. Errichello got the assignment to see if they could work it out—or work it out. Is that correct?

A: Yes.

JUDGE KERN: Who gave them that assignment?

A: I think Steve Kress called them, and asked them if that was—that could be done, to give the crewmembers the 401(k), if there was any problems with that.

JUDGE KERN: And, had he discussed it with you, before he called them?

A: Well, he --

JUDGE KERN: What I'm—what I'm trying to get at is where is the beginning of the decision-making process here? When . . . did it start?

A: The time we discussed it . . . was with the letter, the letter from the crewmembers . . . I guess, from that point on, he—he talked to Nancy or Beverly, to see if they could extend it to crewmembers. Because, they were working on—this is what I've—I'm confused. I don't remember giving it to the captains prior to that, and yet I knew they were—Nancy and Beverly were working or looking into whether they could give it to the captains. And then Steve, some time in June, called to see if they could extend it to the crewmembers after the election. But, I don't recall that it was ever given to the captains earlier.

On July 8, Kress issued a memorandum announcing the implementation of the plan on September 1. Kress testified the plan was not limited to employees operating out of New York harbor, but extended to all crewmember under his management. The memo read in relevant part:

At this time, we are pleased to announce to you, your eligibility to participate in the company 401 K Plan. As non Union employees of McAllister Brothers, you will be able to contribute up to fifteen (15) percent of your annual wages up to a maximum of \$9,500.00 (per 1997 regulations). The company

<sup>12</sup> It is not clear if Shulman attended the first meeting or second meeting.

will match that contribution, dollar for dollar, to a maximum of \$1,000.00 per calendar year. The separate five (5) dollar a day checks issued through payroll, will cease. The five dollars will then be added to everyones [sic] daily wage, thus increasing your per diems by five dollars...it is our intention to have everyone start with the 401 K plan by Monday September 1, 1997.

Rosenbrock testified prior to the election there were rumors employees were going to get a 401(k). When pressed to pinpoint the date he heard these rumors, he testified, "end of May, during June. It's so long ago, I'm sorry. It was quite a while ago."

#### *K. Holidays*

As previously mentioned, Sanborn obtained a copy of a competitor's Union contract in June. He observed the contract provided for paid holidays and testified "we were trying to bring the crewmembers in line with that." He and Kress discussed the issue of holidays in July and on August 15, Kress issued a memorandum announcing the granting of five paid holidays to all employees under his management, including captains.

#### *L. TV's and VCR's*

Sanborn testified one of the employee demands was for VCRs on the boats. After the election he noticed a stack of six to eight VCRs in shipping boxes in the office. He does not know what happened to these boxes. To his knowledge, new VCRs were not put on any of the boats prior to or after the election.

Litrell testified on the day he began his employment, June 18, a new television was installed on the Justine to replace a broken one. During his time on the Justine, the employees also had use of a VCR. Litrell worked for a time on the Walrow that had a television and VCR. To Litrell's knowledge, every boat had a television and a VCR.

Kress testified since 1982, McAllister Brothers provided a television set on every tugboat operating in New York harbor. When a set breaks, or when a new boat arrives in the harbor that does not have a television, a working television is provided. In the 4 years prior to the hearing, televisions were replaced on an average of 4 to 6 times per year.

#### *M. Grievance Procedure*

Sanborn testified some time in July he authorized Kress to set up a grievance committee as had been requested in the employee demand letters. He assumed Kress did as directed, but admitted that to his knowledge, no grievance committee was ever implemented. There had been no discussions about implementing a grievance procedure prior to the filing of the petition.

Under 611(c) examination, Kress testified "in or around May or June" he issued a memorandum notifying crewmembers they could contact the personnel manager if they thought an action taken by a captain was unfair. According to Kress, this statement was made in the context of announcing the replacement of Jean Floccari by Young as personnel manager. Prior to Young taking over, if a crewmember had a complaint he could lodge it

with the receptionist, Floccari, Donna Sclara or Kress himself. Kress testified at the time of the hearing, McAllister Brothers did not have a grievance procedure in place.

Litrell testified after the election, a grievance committee was implemented. Under cross examination, however, he conceded he did not see any documentation relating to this subject either before or after the election and no employee had been terminated during his tenure of employment. Nor was he aware of a captain ever recommending an employee being fired.

#### *N. Staffing Patterns and Turnover*

Typically, nine employees on two crews are assigned to each boat: an onboard crew consisting of a captain, a mate, two deckhands and an engineer, and a relief crew consisting of a captain, a mate, a deckhand and an engineer. Sanborn testified in 1997, McAllister Brothers operated six or seven tugboats in New York harbor, and an additional six or seven boats outside the harbor. Kress testified at the time of the July 2 election, McAllister Brothers was regularly operating seven tugboats with 47 crewmembers (excluding captains) in New York harbor. On August 15, an eighth boat joined the fleet and in December a ninth boat. At the time of the hearing, 11 tugboats were operating in New York harbor.

Respondent introduced a list of 96 active employees working in New York harbor as of September 30, 1999.<sup>13</sup> Young testified 17 of the listed employees were full-time captains. Of the remaining 79 employees, 24 had been eligible to vote in the election and 17 were card signers

#### *O. Posthearing Motions to Supplement the Record, for Recusal of the ALJ and to Strike Application for Sanctions Against Respondent's Counsel*

Respondent filed a posthearing motion to supplement the record, proffering that as of January 1, 2000, 69 employees were working in New York harbor excluding full-time captains.<sup>14</sup> Of these 69 employees, 19 had been eligible to vote and 12 were card signers. On January 21, 2000, the General Counsel filed its opposition to Respondent's motion.

On November 18, 1999, counsel for Respondent filed an affidavit and memorandum requesting I disqualify myself and withdraw from the proceedings on the ground I had created an appearance of bias.

In its posthearing brief, the General Counsel argued it would be an appropriate exercise of the administrative law judge's discretion, pursuant to Board's Rules and Regulations Section 102.177(b), to admonish or reprimand counsel for Respondent for engaging in a pattern of misconduct at the hearing. On November 29, 1999, Respondent filed a motion to strike what it denoted as General Counsel's application for sanctions.

<sup>13</sup> A total of 100 names appear on the list. Three employees terminated their employment on September 20 and Djokie was laid off in February 1999 and is mistakenly listed as an active employee. Therefore, the list reflects 96 active employees as of September 30, 1999.

<sup>14</sup> According to the proffer, by January 1, 2000, card signers Clancy and Moulton were full-time captains.

## IV. ANALYSIS

A. *The Bannon Mills' Issue*

Analysis of the *Bannon Mills'* issues begins with the answer filed in this case. Respondent denied, in whole or in part, every allegation in the complaint. On July 2, 1999, 12 days before the opening of the hearing, Respondent was properly served with two subpoenas duces tecum seeking documents relating to the issues that had been joined. A third subpoena was served on July 7. Among the litany of objections raised in its petitions to revoke, Respondent objected to the subpoenas on the ground that compliance would require the production of hundreds of thousands of pages of documents and would be unduly burdensome. What Respondent failed, and continues to fail, to apprehend is the scope of the documents sought in the subpoenas was directly related to the scope of the denials in its answer.

The day before the hearing, I conducted a 90-minute conference call during which I advised Respondent's counsel that I would issue a written decision on the petitions to revoke at the commencement of the proceedings the next day. I orally advised counsel that Respondent should be prepared to comply with the subpoenas as soon as the hearing opened.

At the commencement of the hearing, I issued a written order directing Respondent to comply with the General Counsel's subpoenas except where indicated. Respondent's counsel responded he would consult with his client and thereafter announce how promptly Respondent would comply. After I informed counsel Respondent was expected to comply when ordered to comply, counsel characterized the subpoenas as "ridiculous" and argued Respondent was under no obligation to even begin the process of gathering documents responsive to the subpoenas until there had been a ruling on the petitions to revoke. The General Counsel then moved for *Bannon Mills'* sanctions. Respondent's counsel protested, arguing the request for sanctions was being made before Respondent had been given an opportunity to comply. In his words, "the way to proceed is that we can consult with our client and we advise you how quickly we can comply."

I granted the application for *Bannon Mills'* sanctions to the extent that I allowed the General Counsel to prove by secondary evidence those issues where there was noncompliance with the subpoenas and I precluded Respondent from rebutting that evidence. I denied the General Counsel's application to restrict Respondent's right of cross examination with respect to any witness, and I indicated I would only draw those adverse inferences that were appropriate. Contrary to Respondent's position, both at the hearing and in its brief, there is substantial Board and court precedent for the sanctions imposed. *Perdue Farms, Inc.*, 323 NLRB 345 (1997), enf. 144 F.3d 830 (D.C. Cir. 1998); *Hedison Mfg. Co. v. NLRB*, 643 F.2d 32 (1st Cir. 1981); *NLRB v. C. H. Sprague & Son Co.*, 428 F.2d 938, 942 (1st Cir. 1970); *NLRB v. American Art Industries, Inc.*, 415 F.2d 1223, 1230 (5th Cir. 1969), cert. denied 397 U.S. 990 (1970); *Midland National Life Insurance Co.*, 244 NLRB 3 (1979), enf. 621 F.2d 901 (8th Cir. 1980); *Bannon Mills, Inc.*, 146 NLRB 611 (1964).

Respondent's claim that it never actually refused to comply with the subpoenas is without merit. A subpoena is not an invi-

ation to comply at a mutually convenient time. *Hedison Mfg. Co.*, 249 NLRB 791 (1980), enf. 643 F.2d 32 (1st Cir. 1981). It is an exercise of the Board's power under Section 11 of the Act. Respondent was compelled to produce the documents when directed to do so. This is particularly so where, as here, Respondent had been in possession of the subpoenas well in advance of trial. I reject Respondent's related claim that as long as the petitions to revoke were pending, it was under no obligation to undertake efforts toward compliance. Respondent ignores the fact that it was in possession of two of the subpoenas for 7 days prior to the filing of the petitions to revoke.<sup>15</sup> Nor do I agree once the petitions to revoke were filed this obligation was suspended. When a subpoena is lawfully issued and properly served, it continues to be valid unless withdrawn by counsel for the General Counsel, quashed by an administrative law judge or by the Board, or released by an administrative law judge or other judicial authority after due and proper compliance. *Hedison Mfg. Co.*, supra. Respondent had ample time to comply with the subpoenas and failed to do so.

Respondent's second argument is that its proffer of documents after the imposition of sanctions constituted meaningful compliance and that the General Counsel was not prejudiced by the delay. The irony of this argument is when Respondent finally undertook efforts to comply with the subpoena, three litigation size boxes of documents appeared in the hearing room within several hours which counsel represented as "substantial" compliance. One of two conclusions can be drawn. The first conclusion is that the claim made by Respondent at every stage in these proceedings, i.e. that the subpoenas called for the production of hundreds of thousands of pages of documents located throughout the world, was just so much hyperbole. Alternatively, it may be concluded the three boxes represented only a portion of the subpoenaed materials and the balance of the documents would have trickled into the hearing room at a pace determined by Respondent's self-styled standards of reasonableness. It is the responsibility of the administrative law judge to regulate the course of the hearing. I determined once counsels for the General Counsel decided to proceed in the absence of the subpoenaed documents, a decision which was entirely in their purview, and after the *Bannon Mills'* sanctions were imposed, I would not compel the General Counsel to accept Respondent's tardy and questionable offer of a "substantial" number of documents. It is improper for a respondent to attempt to order and manipulate the presentation of the General Counsel's case in this manner *P.S.C. Resources, Inc.*, 231 NLRB 233, 235 (1977), enf. 576 F.2d 380 (1st Cir. 1978).

This case was remarkable for the difficulty in getting subpoenaed witnesses to appear on time or, in some cases, at all. A number of employee witnesses who were working could not physically appear when subpoenaed because they were aboard vessels and their appearances had to be rescheduled. Eleven subpoenaed witnesses failed to appear at all. Several of the witnesses who did appear were promptly called to the witness stand out of concern they would not return. Had counsels for the General Counsel in these circumstances accepted piecemeal

<sup>15</sup> The two subpoenas served on July 2 contained 59 out of the 60 pars. demanding documents.

production of the subpoenaed documents, it conceivably could have meant that after inspection of the documents, they would have been forced to recall the witnesses previously presented in order to testify about issues raised by the documents. This would have substantially disordered and prolonged the presentation of testimony. *Ibid.*

Respondent's final argument is this: "In order to meet the standard of instantaneous compliance adopted by the ALJ, Respondents would have had to bring in every document contained in every file and warehouse in the operations of Respondents and their affiliates throughout the world, and then instantaneously cull through that abundance of documents to produce the documents required by the just-revised subpoenas." Of course, Respondent brought no documents to the hearing in response to the contested portions of the subpoenas. Had Respondent made any meaningful attempt to comply with the subpoenas when ordered, a request for time to remove those documents not required to be produced would have been considered and granted.

For all of these reasons, I adhere to my previous ruling imposing *Bannon Mills'* sanctions on Respondent.

#### B. Single Employer Issue

Prior to August 1998, McAllister Brothers was the largest tugboat division of MT&T which was owned by Bill Kallop and Brian McAllister. Kallop was the president and chief executive officer, and Kress was the general manager, of both entities. Kress reported directly to Sanborn who in turn reported to Kallop. Kress and Sanborn discussed and determined wages and benefits for McAllister Brothers' employees. Simon Young, the personnel manager for McAllister Brothers, was an employee of MT&T. Reilly, the treasurer of MT&T, coordinated human resource services and benefits administration for all of MT&T's affiliates, including McAllister Brothers. After August 1998, Brian McAllister became the sole owner of MT&T and McAllister Brothers was merged into the parent entity. Kress continued as the general manager, and Young and Reilly continued to perform services for the employees of McAllister Brothers.

The Board normally applies the single employer doctrine to situations in which ongoing, nominally distinct businesses are alleged to be one and the same and the evidence reveals: (1) some functional interrelation of operations, (2) centralized control of labor relations, (3) common management, and (4) common ownership or financial control. While none of these factors, separately viewed, has been held controlling, stress has normally been laid upon the first three. *Pulitzer Publishing Co. v. NLRB*, 618 F.2d 1275, 1279 (8th Cir. 1980), cert. denied, 449 U.S. 875 (1980), quoting *Parklane Hosiery Co.*, 203 NLRB 597, 612 (1973). Ultimately, single employer status depends on all the circumstances of the case and is characterized by the absence of an arm's length relationship found among unintegrated companies. *NLRB v. Browning-Ferris Industries*, 691 F.2d 1117, 1122 (3rd Cir. 1982).

Applying these principles, the evidence establishes a functional interrelation of operations between McAllister Brothers and MT&T, centralized control over labor relations, common management and common ownership. I therefore find at all

material times, MT&T and McAllister Brothers have constituted a single-integrated enterprise and a single employer within the meaning of the Act.<sup>16</sup>

#### C. Authorization Cards

##### 1. Cards introduced through witness testimony

Respondent challenges the cards of D'Amelio, Moulton, Dean Kinnier, Tizzano, and Wong on the ground they were tainted by the Union's improper promise to waive back dues. Respondent challenges the cards of Cassar and Zuniga on the ground statements were made to these employees that contradicted the clear language of the card. Respondent challenges the card of Smith on the ground there is insufficient evidence to establish he signed the card prior to May 31. Finally, Respondent challenges the card of Ligouri on the ground he did not identify his signature on the card.<sup>17</sup>

##### a. Waiver of back dues

On two occasions the Union communicated to employees if the Union won the election and a ratified contract reached, dues and initiation fees would be waived. The first occasion was in April or May when Torressen told Rosenbrock to tell employees if a ratified contract were eventually reached, all initiation fees would be waived and anyone who was a former member of the Union would be forgiven any back dues owed. Rosenbrock did not testify he repeated these specific promises to employees, and no employee witness testified they were told of these promises by Rosenbrock. Nevertheless, Cassar, D'Amelio, Dean Kinnier, Moulton and Wong testified about hearing rumors to this effect and there is a notation on the back of Jeffrey Tizzano's card regarding dues and initiation fees. Specifically, Cassar testified he heard "others" say initiation fees would be waived. D'Amelio testified he heard something about an initiation fee being waived but he could not recall if he heard this before the election. He also heard "from someone" if an employee had previously been a member of the Union he would not have to pay back dues. With respect to Dean Kinnier, Respondent made an offer of proof he would testify it was common discussion among employees that the Union had promised back dues obligations would be waived.<sup>18</sup> Moulton testified prior to signing his card he heard rumors employees would not have to pay money to the Union, at least initially. Wong, who wrote the words "initiation and back dues waived" on the back of his authorization card, testified the gossip amongst employ-

<sup>16</sup> It should be noted that in its answer, Respondent denied the single employer allegations in paragraphs 2(c), (d) and (3) solely on the ground that it was without knowledge as to the term "at all material times." Respondent did not address the single-employer issue in its brief.

<sup>17</sup> Respondent does not argue in its brief that any of the authorization cards should be rejected on the ground that the local number "333" was not written on the cards when they were signed. I would reject such an argument if it were made. I credit Dady's testimony that he wrote the number on most if not all of the cards. I further find that every employee who testified, with the exception of Zuniga, was aware they were signing a card for the Union.

<sup>18</sup> I reverse my former ruling sustaining the objection to this testimony, and accept this offer of proof as the testimony of Dean Kinnier.

ees was that initiation and back dues would be waived if he rejoined the Union. Tizzano's authorization card was introduced through signature comparison. On the back of his card were written the words "no initiation [sic] no back dues."

The second occasion when the Union communicated to employees regarding dues and initiation fees was in its May 28 letter. In that letter, the statement was made that if the Union won the election, and if a contract was obtained, all employees who were eligible to vote would not have to pay an initiation fee and any employee member in arrears on his dues would not be charged back dues. Both of these benefits would start on the day the contract was signed.

The Union's promise to waive initiation fees in this case was proper and Respondent does not contend otherwise. The waiver was not conditioned on an employee's act of signing or otherwise supporting the Union prior to the election. *NLRB v. Savair Mfg. Co.*, 414 U.S. 270 (1973); *L.D. McFarland Co.*, 219 NLRB 575, 576 (1975), *enfd.* 572 F.2d 256 (9th Cir. 1978). Similarly, the waiver of back dues for those employee members who were in arrears was not conditioned on those employees signing a card or supporting the Union prior to the election. The offer was effective only upon the signing of a collective-bargaining agreement. Cf. *Equitable Construction Co.*, 266 NLRB 668 (1983) (waiver was only available during an organizing drive).

Respondent argues the Board's decision in *McCarty Processors, Inc.*, 286 NLRB 703 (1987), dictates a finding the waiver of back dues was an improper inducement to employees to sign authorization cards. I disagree. The Board distinguishes between promises to waive back dues that employees have an enforceable obligation to pay and promises to waive back dues they are not obligated to pay. In *McCarty Processors*, employees were obligated to pay dues pursuant to a valid union-security clause. In the course of a decertification election campaign, the Union waived that obligation. The Board held the expiration of the collective-bargaining agreement did not end the employee-members' obligation to pay dues. The Union was still entitled to collect dues and its promise not to do so was improper. Similarly, in *Loubella Extendables, Inc.*, 206 NLRB 183 (1973), again decided in the context of a decertification election, the Board concluded the waiver of dues by the incumbent Union related to an obligation incurred by employees under the terms of an existing collective-bargaining agreement. The waiver therefore constituted a promise of benefit by the Union to secure these employees' votes. *Id.* at fn. 6.

In contrast are those situations that arise in the context of an initial organizing campaign where a union offers to waive the payment of dues incurred while the member was working for a different employer. These members cannot be required to pay the back dues as a condition of retaining their employment with the present employer. The question in these cases is whether the union's constitution and bylaws require the collection of dues, or whether it has been the union's practice to collect them. *Andal Shoe Inc.*, 197 NLRB 1183 (1972). If the back dues' obligation is not enforceable, or if a union is not in the practice of collecting back dues, an employee does not receive a financial benefit from a union's promise to waive that which isn't owed. In these situations, a union's promise to waive back

dues simply removes an artificial obstacle to the endorsement of the union by creating a situation in which the employee will not have to pay back dues whether he votes for or against the union. *Associated Ready Mixed Concrete*, 318 NLRB 318 (1995), *enfg.* 108 F.3d 1182 (9th Cir. 1997).

Respondent contends two card signers, Dean Kinnier and Wong, were former members of the Union who stood to benefit from the back dues waiver. Kinnier testified as of July 1999, he had been an employee of McAllister "for about nine years." I take judicial notice of the fact the last effective collective bargaining agreement between Respondent and the Union expired on February 15, 1988. *McAllister Bros.*, 312 NLRB 1121 (1993). Contrary to Respondent's representation in the brief, Sanborn testified the Union struck in 1988 (not 1989), at least 2 years prior to the commencement of Kinnier's employment. The evidence therefore does not establish Kinnier was ever a member of the Union. Consequently, the offer to waive past dues did not represent a promise of financial benefit to him.

Wong testified the last time he worked on a union job was in 1988 when the Union struck Respondent. From this testimony it is not entirely clear whom Wong worked for in 1988 although it suggests he worked for Respondent. Regardless of which union employer he worked for in 1988, Wong was not directly asked whether he continued to pay dues after 1988. Thus, the evidence is insufficient to establish he was obligated to pay back dues to the Union at the time he signed his authorization card. Assuming one could infer from his testimony he had fallen delinquent in his dues from 1988 to 1997, no evidence was adduced as to whether the Union's constitution and bylaws require the payment of back dues or whether the Union has a past practice of collecting back dues. I therefore conclude there is insufficient evidence to establish Wong was obligated to pay back dues and therefore insufficient evidence to establish the Union's offer to waive the payment of back dues represented a promise of financial benefit to him.<sup>19</sup>

#### b. Clear language argument

The authorization card in this case was dual-purposed. The first purpose was to apply for union membership, and the second purpose was to authorize the Union as the card signer's collective-bargaining representative. Respondent challenges the cards of Cassar and Zuniga on the ground the language on the card was canceled by statements made to them by union officials and adherents.

Cassar testified on cross examination that it was his understanding the only purpose for signing the card was to get a vote for the Union. On redirect examination, however, Cassar testified the basis of his understanding was overheard conversations amongst other employees and no one specifically told him the purpose of the card. On both direct and redirect examination, Cassar testified he read the card before he signed it. Zuniga testified on May 6, he was fearful of losing his job at Respondent due to lack of work and he went to the union hiring hall to register. An unnamed union official gave him an authorization

<sup>19</sup> As to the remaining 28 card signers, there is insufficient evidence to establish that any of them were ever members of the Union.

card and told him if he signed the card and paid a fee, the Union would get him a job. Zuniga testified it was his understanding the purpose of the card was to enable him to get a job through the Union. On May 17, Zuniga signed a second authorization card. This card was handed to him by employee Williams. Zuniga testified he read the card but did not really understand what it said since Spanish is his first language. He explained he can read a little bit of English but not much.

The Supreme Court has recognized employees are not too unsophisticated to be bound, and should be bound, by the clear language of what they sign unless that language is deliberately and clearly canceled by a union adherent with words calculated to direct the signer to disregard and forget the language above his signature. Nor is there any inconsistency in handing an employee a card that says the signer authorizes the Union to represent him and telling him the card will probably be used first to get an election. *NLRB v. Gissel Packing*, 395 U.S. 575, 606-607 (1969).

Applying these principles to the case of employee Cassar, I find there is no basis to conclude that a union adherent clearly and deliberately canceled the language of the authorization card. At most Cassar heard other employees talking about this subject and he specifically testified no one told him the purpose of the card. He read the card before he signed it and I find he is bound by what he signed.

I reach a contrary result, however, in the case of employee Zuniga. His uncontradicted testimony was that a union official told him if he signed the card the Union would get him a job. These words reasonably led him to conclude the only purpose of the card was to enable him to register with the hiring hall. Based on my observations of Zuniga on the witness stand, I credit his testimony that Spanish is his first language and his ability to read English is limited. Under these circumstances, I find the May 6 card invalid and should not be counted. As to the May 17 card, the General Counsel correctly points out all of the handwriting on this card was entered appropriately, i.e., Zuniga printed his name in the space that called for a printed name, he signed the card where the space called for a signature, etc. The General Counsel also correctly states Zuniga testified without the aid of a Spanish interpreter. I am unable, however, to conclude from this that Zuniga understood the import of the dual-purpose card. A witness may well be able to speak English unassisted, but need an interpreter to understand the written word. I credit Zuniga's testimony that he read the card given to him by Williams, but I also credit his testimony that he did not really understand what he read. Coupled with the fact that 11 days earlier a Union official directly contradicted the meaning of the card, I conclude Zuniga's May 17 card is invalid and should not be counted.

### c. *Smith and Ligouri*

Respondent contends there is insufficient evidence to establish Smith signed his card prior to May 31. I find this argument without merit for three reasons. First, the card is dated May 15 and that date is presumed valid. *Zero Corp.*, 262 NLRB 495, 499 (1982), *enfd.* 705 F.2d 439 (1st Cir. 1983). Second, the card was date stamped received by the regional office of the Board on May 30. Smith obviously had to have signed the card

on or before that date. Finally, although Smith testified he could not recall when he signed the card and the date written on the card did not appear to him to be his handwriting, an examination of the card shows all of the handwriting on the card is by the same hand and the same pen. Since Smith acknowledged he signed the card, I conclude he did so on May 15.

John Ligouri testified he signed an authorization card on May 25. He identified all of the handwriting on the card as his own, including his signature, and Respondent had no objection to the authenticity of the card when it was offered in evidence. Respondent's assertion in its brief that Ligouri did not testify he signed the card is simply inaccurate. Ligouri's card is valid and should be counted.

### 2. Signature comparison cards

The General Counsel introduced 11 authorization cards through signature comparisons. Respondent challenges 10 of these cards on the ground the Board has never approved signature comparisons with Coast Guard documents maintained in employee personnel files. I find this argument to be without merit.

As discussed above, the General Counsel subpoenaed original W-4 forms and job applications for the purpose of signature comparison. These documents were not produced and fell within the scope of the *Bannon Mills*' sanction. The General Counsel later subpoenaed the Coast Guard documents maintained in Respondent's personnel files for the same purpose and Judge Preska ordered those documents produced. When the General Counsel offered these documents at the hearing, Respondent objected on the ground the documents did not contain known exemplars of employees' signatures. Respondent argued that unlike W-4 or other employer-generated forms that are signed at the request of an employer and in the employer's presence, the Coast Guard documents contained signatures placed on the documents at unknown places and unknown times. In overruling Respondent's objection, I lifted the *Bannon Mills*' sanction on this limited issue and gave Respondent the opportunity to introduce the W-4 forms which Respondent claimed were the "best evidence" of employees' signatures. Respondent did not avail itself of this opportunity and did not introduce the W-4 forms.

A Board judge, as the trier of fact, may authenticate an authorization card by comparing the card signature with an authenticated specimen. For many years, the Board has treated employee-signed documents subpoenaed from a respondent's personnel files as being genuine specimens for purposes of comparison with authorization card signatures. *Traction Wholesale Center Co.*, 328 NLRB 1058 (1999), *enfd.* 216 F.3d 92 (D.C. Cir. 2000). Respondent stipulated it was a condition of employment for each employee to produce Coast Guard documents and the documents were thereafter maintained in each employee's personnel file. I also take judicial notice of the following provisions of the United States Code: 46 U.S.C. 7302 ("a merchant mariner's document . . . serves as a certificate of identification and as a certificate of service, specifying each rating in which the holder is qualified to serve on board vessels on which that document is required); 46 U.S.C.A. 7303 ("a merchant mariner's document shall be retained by the sea-

man to whom issued. The document shall contain the signature, notations of nationality, age, and physical description, the photograph, the thumbprint, and the home address of the seaman. In addition, the document shall specify the rate or ratings in which the seaman is qualified to serve"); and, 46 U.S.C.A. 8701(b) ("a person may not engage or employ an individual, and an individual may not serve, on board a vessel to which this section applies if the individual does not have a merchant mariner's document"). Under these circumstances, it is entirely appropriate to compare the signatures on the authorization cards with the corresponding signatures on the Coast Guard documents contained in Respondent's personnel files. Both the source of the handwriting specimens and the nature of the documents involved are strong evidence of the genuineness of the signatures. *Aero Corp.*, 149 NLRB 1283, 1287 (1964). Respondent had the opportunity to attack the genuineness of the signatures on the Coast Guard documents by introducing the W-4 forms but chose not to.

Based upon a comparison of the authorization cards with the Coast Guard exemplars, I find the cards of David Belasco, Thomas Gaede, James Hitchcock, John Horst, Alvin Moe, Patrick Riordan, Paul Sarmento, Jeffrey Tizzano, Gregorio Velasco, and Hillis Edward Waddell have been properly authenticated and should be counted.<sup>20</sup>

The General Counsel argues these 11 cards are also admissible as course of campaign cards. The credible and uncontradicted testimony of General Counsel's witnesses Torressen, Dady, and Rosenbrock establishes Torressen gave authorization cards to Rosenbrock in April or May. Rosenbrock distributed approximately 50 cards to employees and returned a number of signed cards to Torressen at the union hall. Cards that were received by mail were put in Dady's mail slot by the office secretary. He examined the cards and put them in a marked file. Cards that were hand delivered were given to Dady by the receiving union official and he followed the same procedure of placing the cards in a marked file. The cards remained in the Union's control until they were forwarded to the Board's regional office on May 30 and June 9. When the cards were offered into evidence, Respondent did not raise a challenge to their authenticity based upon comparison with its W-4 forms. Under these circumstances, I find the evidence sufficient to establish these cards were obtained in the course of an organizational campaign and may therefore be considered valid des-

ignations as course of campaign cards. *I. Taitel & Son*, 119 NLRB 910, 912 (1957), enfd. 261 F.2d 1 (7th Cir. 1958), cert. denied 359 U.S. 944 (1959), rehearing denied 359 U.S. 976 (1959).

Finally, Respondent raises two objections to the card of John Horst. First, Respondent asserts the card was not date-stamped by the regional office. The card does in fact bear a date stamp of June 9. Second, Respondent argues the card is dated June 2 which is after the time the General Counsel alleges the Union achieved majority status. Because I find Respondent commenced its unlawful conduct on June 6, Horst's card is properly counted toward the Union's majority status as of that date. *Holly Farms Corp.*, 311 NLRB 273, 281 (1993).

### 3. Conclusion

Of the 30 authorization cards introduced by the General Counsel, I find 29 of them to have been validly executed. I therefore conclude that as of June 6, the Union enjoyed majority support amongst the 47 employees in the appropriate unit.

### D. Credibility

Without hesitation I credit the testimony of Sanborn. Sanborn impressed me as a person attempting at all times to give an honest recitation of events. Interestingly, both the General Counsel and Respondent argue his testimony should be discredited to varying degrees. The fact that Sanborn gave testimony which was helpful and hurtful to both sides enhanced his credibility in my view. When the General Counsel asked him to give a statement, he said he would not do so without a subpoena. When counsel for Respondent asked him to testify, he told him he would not do so without a subpoena. His attitude was "if anybody wants me, subpoena me. I said the same thing to [the General Counsel]. I said the same thing to [Respondent's counsel]." I have considered the credibility arguments made by all parties as well as the evidence adduced regarding the circumstances of Sanborn's separation from employment. I nevertheless conclude Sanborn was truthful witness and I credit his testimony in all respects.

Kress' testimony was largely circumscribed by General Counsel's 611(c) examination and by the *Bannon Mills*' restrictions. It was nevertheless contradicted in critical areas. First, Kress testified Sanborn authorized the June 1 increase on May 13. Young, however, testified at the end of May when he discussed wage levels with Kress, Kress made no mention of the fact that a June increase had been approved. Certainly Kress would have told Young a wage increase had just been approved 2 weeks before their conversation had that been the case. Young's testimony is consistent in this regard with Sanborn's testimony that the June increase was not decided upon until the first week in June. Second, Kress testified he had a conversation with Sanborn on May 28 about the possibility of a "Union vote" and its impact on the scheduled wage increase. Not only was the wage increase not scheduled as of May 28, the petition had not yet been filed. The petition was filed on May 30 and faxed to Respondent the same day and there is no evidence that Kress, or any other management official, was aware of the possibility of a "Union vote" prior to May 30. Third, Kress' testimony was self-contradictory. The first handwritten entry on the memo he prepared was of a conversation he supposedly had

<sup>20</sup> With respect to Patrick Riordan I disagree with Respondent's argument that the signatures are so dissimilar as to conclude that they are different. I find the signatures sufficiently similar to conclude they are the same. Moreover, Respondent was free to introduce Riordan's original W-4 form. From its failure to do so, I draw the adverse inference that the W-4 form would have shown a signature the same as the signature on the authorization card. *Zapex Corp.*, 235 NLRB 1237, 1239 (1978), enfd. 621 F.2d 328 (9th Cir. 1980). With respect to Hillis Edward Waddell, the portion of the signature visible on the Coast Guard document is identical to the corresponding portion of the signature on the authorization card. In its brief, Respondent does not raise a specific challenge to Waddell's card because of this fact. Nevertheless, I would again note that Respondent was free to introduce the original W-4 form for employee Waddell which would have shown the entire signature.

with Sanborn on January 6 during which Sanborn approved an overall increase of \$35 per day for deckhands by the end of the year. Under 611(c) examination, however, Kress admitted as of January 6, Sanborn had not in fact given authorization for the June and December increases. The last handwritten entry was of a conversation he supposedly had with Sanborn during which Sanborn approved the December increase. In a pretrial affidavit, however, Kress stated he did not discuss the December raise with Sanborn because Sanborn had already approved the year-end total of \$35 the previous January. For all of these reasons, as well as my observation of the witness and his demeanor on the witness stand, I credit Kress only where indicated.

I discredit the testimony of Trepasso who was terminated by Respondent after a bitter dispute concerning Trepasso's taking leave under the Family Medical Leave Act to care for his critically ill daughter. After several requests, Trepasso was begrudgingly granted the leave. His daughter's health improved, but Trepasso himself became ill. When he was unable to return to work at the end of the leave period, he was terminated. I have considered these facts in assessing Trepasso's overall credibility and I conclude his testimony was colored by this unfortunate incident.

Trepasso testified he was summoned, without explanation, to appear in Kress and Sanborn's offices on the morning of June 28. When he arrived, Kress immediately accused him of having called for Kress' termination. Trepasso testified his response to this rather serious accusation was to say he was not there to discuss that issue, but rather to present an employee list of demands which he just happened to have with him. I find it incongruous to claim, as Trepasso does, he was summoned without explanation to the general manager's office and once in that meeting, he, and not the general manager, set the agenda. Far more believable is Sanborn's testimony that it was Trepasso who initiated these meetings because he knew he was suspected of spearheading the union effort. He brought the employee list of demands to ingratiate himself with management and to position himself for assignment to a larger tugboat where he could earn more money.

Trepasso's testimony regarding Kress' statements about wage increases is undermined by the documentary evidence. Trepasso testified Kress promised everyone was going to get "an immediate raise." This conversation took place, however, on June 28, 22 days after the June 6 memo approving the June increase and 15 days after the raise appeared in employees' paychecks. It is simply not believable Kress would have characterized the next pay raise as imminent when, by Trepasso's own account, Kress said raises would be given every 6 months. Trepasso's testimony was also self-contradictory. At first Trepasso testified the demand for paid vacation was not included on the list he brought to the June 28 meeting. He later testified this item was on the list, that it was discussed, and Kress told him he was shooting too high. Finally, I discredit Trepasso's melodramatic recitation of his meeting with Sanborn. I fully credit Sanborn's testimony that Trepasso came to his office to deny his involvement with the Union and to request assignment to a bigger boat. I also credit Sanborn's denial that he threatened to take every boat out of New York harbor and locate

them elsewhere if the Union won the election. It is significant the only two employees whom Trepasso could name as persons to whom he repeated this alleged threat both testified as witnesses for the General Counsel and neither testified to any such remark.

#### *E. KRESS' promises and Sanborn's Threats to Trepasso*

For the reasons discussed, I credit Sanborn over Trepasso and find Sanborn did not make the threat attributed to him. I therefore recommend dismissal of that complaint allegation. The argument made in the General Counsel's brief, that Sanborn's comments to nonunit employees about the 1988 strike constituted an unfair labor practice, was not alleged in the complaint and I make no finding with respect thereto. The General Counsel's further argument, that Kress promised a series of benefits to Trepasso which Trepasso then communicated to other employees, is also problematic. First, there is no complaint allegation alleging Kress' comments to be an unfair labor practice. Second, Trepasso was not a credible witness and since he was the only one who testified to the substance of this one-on-one conversation, I find the General Counsel has failed to satisfy its burden of proof regarding alleged promises of benefit made by Kress. See *Blue Flash Express, Inc.*, 109 NLRB 591, 592 (1954). Finally, even if these promises were made, there is no credible evidence Trepasso communicated them to other employees.<sup>21</sup>

#### *F. Wages*

The General Counsel adduced substantial evidence through the 611(c) examination of Kress that in November and December 1996, Respondent identified low wages as the reason it was experiencing a high rate of employee turnover. Kress testified employees were coming to Respondent for training and then leaving to go to other companies. This testimony was corroborated by Rosenbrock's testimony that he went to work for Respondent in order to gain experience so that he would be referred to other jobs through the Union hiring hall. The General Counsel elicited from Kress that by the end of 1996, he was aware the majority of employers operating in New York harbor were party to union contracts that offered wages higher than those paid by Respondent. Motivated solely by the severe problem of employee turnover, Kress requested, and Sanborn approved, a \$10 per day across-the-board increase effective January 6. Sanborn's testimony is consistent with Kress' testimony in this regard.

Young testified without contradiction he was hired in May to address the continuing problem of employee turnover. As a former member of the Union, Young quickly discerned low

<sup>21</sup> Only one employee, Dean Kinnier, testified he heard Trepasso say "the stuff that we were looking for was in the works." Kinnier's testimony is confused in several respects. First, Kinnier testified this remark was made two or 3 weeks before the election. Trepasso's meeting with Kress was four days before the election. Second, Kinnier testified that he saw Trepasso enter the office during the course of an employee meeting and then return to the group after which he made the statement. It is clear from the evidence that Trepasso did not attend a meeting of employees prior to his early morning meeting on June 28. In any event, I do not find Kinnier's statement, even if true, establishes that Kress made unlawful promises of benefit to Trepasso.

wage rates was the source of the problem and he told Kress unionized employees probably made \$30 per day more than Respondent's employees. His testimony was corroborated by the Union's June 23 letter to employees showing the Union's contractual wage rates outstripped the wage rates paid by Respondent in every employee category.

I fully credit Sanborn's testimony that in late 1996 he committed to review wage rates every 6 months in view of the problem of employee turnover. With the filing of the petition on May 30, Sanborn was perforce required to conduct that review in the context of the representation proceeding. Thus, when Sanborn was considering whether or not to grant the mid-year increase, he was confronted with the continuing problem of employee turnover, a wage rate below that of his competitors and the petition for an election. Sanborn's testimony describing how he made the decision to grant the increase reflects the interaction of all three considerations. Sanborn readily acknowledged he and Kress were under considerable pressure from upper management to win the election. He testified the 6-month review "would have taken us to July 1st, and the election was July 2nd, and it would have looked very bad. So, we sort of moved it up a little bit." Here Sanborn was in error. The January increase was effective January 6. Six months from January 6 was July 6, four days *after* the election. By granting the increase effective June 1, Respondent altered the timing of the raise by more than a month and in sufficient time to affect the outcome of the election.

In *Noah's Bay Area Bagels, LLC*, 331 NLRB 188 (2000), the Board recited the standard for determining whether conduct involving the grant of benefits during the pendency of a representation proceeding is unlawful:

It is well established that the mere grant of benefits during the critical period is not, per se, grounds for setting aside an election. Rather, the critical inquiry is whether the benefits were granted for the purpose of influencing the employees' vote in the election and were of a type reasonably calculated to have that effect. As a general rule, an employer's legal duty in deciding whether to grant benefits while a representation proceeding is pending is to decide that question precisely as it would if the Union were not on the scene. In determining whether a grant of benefits is objectionable, the Board has drawn the inference that benefits that are granted during the critical period are coercive, but it has allowed the employer to rebut the inference by coming forward with an explanation, other than a pending election, for the timing of the grant or announcement of such benefits. [Citations omitted.] Further, while an employer is not permitted to tell employees that it is withholding benefits because of a pending election, it may, in order to avoid creating the appearance of interfering with the election, tell employees that implementation of expected benefits will be deferred until after the election—regardless of the outcome . . . [An employer] may prove that it acted lawfully by establishing that there was a persuasive business reason demonstrating that the timing of the announcement or grant of benefits was governed by factors other than the Union campaign. Such a persuasive

business reason . . . is not necessarily limited to an established past practice or even a course of conduct that was planned prior to the advent of the Union on the scene.

This standard applies throughout the period during which an employer is faced with the possibility of a second election. *Mercury Industries, Inc.*, 242 NLRB 90, 91 (1979); *Gabriel Mfg. Co.*, 201 NLRB 1015, 1017 (1973); *All-Tronics, Inc.*, 175 NLRB 644 (1969).

It is true Respondent implemented the June increase in the same manner it implemented the January 6 increase in that there was no announcement to employees which would arguably have linked the increase, either expressly or implicitly, with the Union's organizing effort. *LRM Packaging, Inc.*, 308 NLRB 829 (1992). Nor did Respondent attempt to close the entire wage gap after the filing of the petition. This was an incremental increase, similar to the January increase, and Respondent's wage levels continued to lag behind the Union's contractual rates after the increase went into effect. I also note the decision to grant the June wage increase was made prior to Sanborn and Kress' receipt of the employee demand letters which occurred sometime between June 22 and June 28. I nevertheless conclude that the timing of the mid-year increase was altered to affect the outcome of the election. I do not doubt that even in the absence of the Union's organizing drive, Respondent would have granted a mid-year increase to address the legitimate business concern of employee turnover. I do, however, find the increase was moved up by more than a month for the sole purpose of securing Respondent's victory in the election.

After the June increase was implemented, Respondent's wages continued to lag behind those of its unionized competitors. The December increase was granted consistent with Respondent's practice of conducting a biannual review. Sanborn testified 1997 was a good revenue year and he approved the wage increase. I therefore find the December increase did not violate the Act.

Under the standard set out in *Noah's Bagels*, I find that by advancing the timing of the mid-year 1997 wage increase by more than a month to occur within the critical period, Respondent deliberately attempted, and in fact succeeded, in affecting the outcome of the election. I therefore find this wage increase violated Section 8(a)(1) of the Act.

#### G. The 401(k) Plan

There is no credible evidence Sanborn or Kress considered a 401(k) plan when they discussed the problem of employee turnover at the end of 1996. Nor was any mention of a 401(k) plan made to Young by Kress when they discussed the turnover problem in May. Sanborn's testimony, which I credit, is that it was not until after he and Kress saw the employee demand letters that Sanborn considered the idea of extending the 401(k) plan to crewmembers. He told Kress all of the demands in the letters appeared "doable."

Sanborn's testimony as to the chronology events surrounding that conversation with Kress is vague and somewhat confusing. I do not infer from this Sanborn was being evasive. To the contrary, I was impressed Sanborn appeared to be trying to give an honest recollection, but there is little doubt the passage of

time clouded his memory. Although the evidence is clear that captains received the 401(k) plan in October 1996 and the crewmembers on July 8, Sanborn could not recall either of these dates. On direct examination, Sanborn testified he and Kress first discussed the 401(k) plan for crewmembers after they received the employee demand letters in June. They did not discuss the matter again until July 8 when Kress came to him and said "we're issuing the 401(k)" and Sanborn signed off on it. On cross examination, Sanborn was asked if he had discussions with Kress "over a period of months about extending the 401(k) plan to crewmembers," and he responded, "That's probably right, yeah." He also testified, in response to a leading question, that it took the benefit administrators "a period of months" to clear the administrative hurdles before extending the plan to the crewmembers. However, when I asked Sanborn about these matters, he reverted to his earlier testimony that the first time the matter was considered was after the employee demand letters were received.

Sanborn's testimony must be evaluated in the context of the surrounding evidence. Unlike the wage increases, there is no documentation in this record that the 401(k) plan was under consideration prior to receipt of the employee demand letters. I attribute Sanborn's testimony that the plan's implementation for the crewmembers took "a period of months," to his confusion between the captains' plan and the crewmembers' plan. Even if I were to accept Respondent's argument that the 401(k) plan had been under consideration for a period of months prior to the filing of the petition, the evidence nevertheless establishes the impetus for the implementation of the plan was the employee demand letters. After the letters were received, Kress called the benefit administrators to see if the plan could be implemented after the election and the memo announcing the plan was sent to employees on July 8.

Respondent asserts the extension of the 401(k) plan on a corporatewide basis is evidence the decision was made for legitimate business reasons. The Board has in some circumstances viewed the corporatewide granting of employee benefits as evidence the action was taken for legitimate business reasons. The Board's approach in these cases has been based on the premise that where there is no other indication of an anti-union motive, a multiunit entity is unlikely to have granted a benefit to all of its employees solely for the purpose of influencing an election that affected only a few. *Network Ambulance Services*, 329 NLRB 1 fn. 4 (1999). In this case Sanborn's testimony establishes the antiunion motive for the granting of the 401(k) plan. Indeed, the extension of the plan corporatewide might reasonably have been calculated to discourage union activity throughout McAllister Brothers. *Holly Farms Corp.*, 311 NLRB 273, 274 (1993). I therefore find Respondent's argument on this point without merit.

The announcement of the 401(k) plan 6 days after the election gives rise to an inference of coercion and that inference is supported by Sanborn's testimony. Respondent has failed to rebut that inference and I conclude the announcement of the plan on July 8, and its implementation on September 1, was an improper grant of benefit in violation of Section 8(a)(1) of the Act.

#### H. Holidays

Sanborn's credible testimony is that after the filing of the petition he obtained a copy of a competitor's union contract and observed it provided for paid holidays. It was his intent to "bring the crewmembers in line with that." Following his receipt of the employee demand letters, Sanborn told Kress he considered the demand for five paid holidays reasonable. In July he and Kress discussed the issue again and on August 15, the announcement was made granting crewmembers five paid holidays.

Like the 401(k) plan, Respondent argues the paid holidays were given to employees on a corporatewide basis. For the same reasons stated above, I find this argument to be without merit.

There is no evidence Respondent considered giving employees five paid holidays prior to the filing of the petition and the granting of this benefit during the pendency of the representation proceeding raises the inference of coercion. Once again, that inference is supported by Sanborn's testimony. Respondent has failed to rebut that inference and I conclude the granting of five paid holidays to employees on August 15 violated Section 8(a)(1) of the Act.

#### I. TV's and VCR's

The evidence fails to establish Respondent installed new television sets and VCR's on the boats as alleged in the complaint. In describing the lists of employee demands, neither Trepasso nor Litrell mentioned a demand for new TV's or VCR's. Nor were TV's and VCR's the subject of discussion between Trepasso and Kress at their June 28 meeting. Sanborn recalled one of the letters did call for installing VCR's on the boats, but he made no mention of TV's in his testimony.

There is no evidence to establish that employees demanded the installation of new television sets on the boats. Nor does the evidence establish that the installation of new television sets during the pendency of the representation proceeding constituted a departure from past practice. Litrell testified that on June 18 a new television set was installed on the *Justine* to replace a broken one. He also testified all the boats had television sets and that after the election several employees who had requested TV's received them. Litrell's testimony does not establish Respondent installed new TV's for the first time during the pendency of the representation proceeding.

Regarding the installation of VCR's, Sanborn testified he had no knowledge what happened to the six or eight new VCR's he observed in the office. To his knowledge, new VCR's were not put on any of the boats prior to or after the election. Litrell's testimony that a VCR was on every boat does not establish Respondent installed VCR's on tugboats for the first time during the pendency of the representation proceeding.

For all of these reasons, I find the General Counsel has failed to establish by a preponderance of the evidence that new TV's and VCR's were installed on the boats and I recommend dismissal of that portion of the complaint.

### J. Grievance Procedure

Sanborn testified that although he authorized Kress to implement the tripartite grievance committee demanded by employees, to his knowledge no such committee was ever established. There is no evidence to contradict Kress' testimony that the memorandum he issued advising employees they could file a complaint with the new personnel manager, Simon Young, was consistent with past practice. Litrell's testimony that a new grievance committee was implemented after the election was undermined by his failure to testify who advised him of that fact, his admission he never saw any documentation to that effect, and his further admission he was unaware of any instance in which the committee had acted.

I find the General Counsel has failed to establish by a preponderance of the evidence that a new grievance procedure was implemented during the pendency of the representation proceeding and I recommend dismissal of that portion of the complaint.

### K. The Bargaining Order Remedy

In *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), the Supreme Court identified two types of employer misconduct that may warrant the imposition of a bargaining order: outrageous and pervasive unfair labor practices (category I), and less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election process (category II). The Supreme Court stated that in fashioning a remedy in the exercise of its discretion in category II cases, the Board can properly take into consideration the extensiveness of an employer's unfair labor practices in terms of their past effect on election conditions and the likelihood of their recurrence in the future. If the Board finds the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order, then such an order should issue. *Id.* at 614–615. In this case the General Counsel seeks a category II bargaining order.

The Board examines of number of criteria relevant to the determination of the appropriateness of a *Gissel* bargaining order: the presence of "hallmark" violations, *M.J. Metal Products, Inc.*, 328 NLRB 1184 (1999); the number of employees affected by the violations, *General Fabrications Corp.*, 328 NLRB 1114 (1999); the size of the bargaining unit, *ibid.*; the identity of the perpetrator of the unfair labor practices, *Consec Security*, 325 NLRB 453, 455 (1998), *enfd.* 185 F.3d 862 (3d Cir. 1999); the timing of the unfair labor practices, *Debbie Reynolds Hotel*, 332 NLRB 466 (2000); the impact of the violations on the Union's majority status, *Sheraton Hotel Waterbury*, 312 NLRB 304 (1993), *enf. denied* on other grounds, 31 F.3d 79 (2d Cir. 1994); and, the likelihood the violations will recur, *General Fabrications*, above.

The three unfair labor practices I have found all involve a significant grant of economic benefit to employees: an across-the-board wage increase in June, the extension of the 401(k) plan in July and the granting of five paid holidays in August. Wage increases are considered "hallmark violations," *Kinney*

*Drugs, Inc. v. NLRB*, 74 F.3d 1419, 1428 (2d Cir. 1996), citing *NLRB v. Chester Valley, Inc.*, 652 F.2d 263, 272 (2d Cir. 1981), and have been recognized as having potential long-lasting effect, not only because of their significance to employees but also because the Board's traditional remedies do not require a respondent to withdraw benefits. *American Best Quality Coatings Corp.*, 313 NLRB 470, 472 (1993), *enfd.* 44 F.3d 516 (7th Cir. 1995), *cert. denied* 515 U.S. 1158 (1995). Because the increases regularly appear in paychecks, they are a continuing reminder that "the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged." *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964). The Board statement in *Tower Enterprises, Inc.*, regarding wage increases 182 NLRB 382, 387 (1970), *enfd.* 79 LRRM 2736 (9th Cir. 1972), is directly applicable here:

It is a fair assumption that in most instances where employees designate a Union as their representative, a major consideration centers on the hope that such representative may be successful in negotiation wage increases . . . A unilateral award of a wage increase by an employer following a Union demand for recognition results in giving the employees a significant element of what they were seeking through Union representation. It is difficult to conceive of conduct more likely to convince employees that with an important part of what they were seeking in hand Union representation might no longer be needed.

By no later than June 2, 29 of the 47 unit employees had validly executed authorization cards and the Union enjoyed clear majority status. One month later, on July 2, the Union lost the election by a vote of 32 to 7. The impact of the timing of the \$15 per day across-the-board wage on June 6 could not be more clear. Particularly telling was Dady's experience the week before the election when he spoke with several employees about why they should vote for the Union. One of the employees said he had already gotten a wage increase and he was not going to put it in jeopardy by talking to Dady.

Sanborn's testimony is convincing evidence of Respondent's intention to grant a series of benefits both before and after the election to discourage employees' support for the Union. Sanborn testified the employees demands were reasonable and it was the company's intention to meet those demands over a period of a year. This stated willingness to continue misconduct after the election evidences a continuing hostility toward employee rights and the strong likelihood of a recurrence of unlawful conduct in the event of another organizing effort. *General Fabrications Corp.*, 328 NLRB at 1115, citing *Garney Morris, Inc.*, 313 NLRB 101, 103 (1993), *enfd.* 47 F.3d 1161 (3d Cir. 1995). I do not consider Sanborn's departure from Respondent's employ to have altered Respondent's view. Kress was intimately involved in all of the decision making regarding the granting of these benefits and he continues as the general manager to the present.

Respondent's extension of the 401(k) plan could only have been perceived by employees as a windfall. Employees could contribute up to \$9,500 annually into a retirement account and have that contribution matched by an annual employer contri-

bution of \$1,000. Employees were also allowed to keep the \$5 per day they had been receiving in lieu of pension. There can be no doubt this is the type of enduring benefit that will have lasting effects on unit employees. Similarly, the granting of five paid holidays effected a significant improvement in the quality of employees' working lives and is a benefit they will continue to reap for the rest of their employment tenure. The Supreme Court has long recognized employees are quick to perceive the "fist inside the velvet glove" implicit in the granting of these types of benefit.

Kress was the general manager and highest ranking official of the McAllister Brothers' subsidiary at the time he announced the granting of the 401(k) plan and the paid holidays to the entire unit of employees. Employees also had to have understood the across-the-board wage increase in June was the result of a decision by the highest levels of management. The impact of Respondent's unlawful conduct was heightened by the relatively small size of the bargaining unit and the direct involvement of the general manager. *Traction Wholesale Center Co.*, 328 NLRB 1058, 1078 (1999); *Laser Tool, Inc.*, 320 NLRB 105 fn. 2 (1995).

The Board has considered a bargaining order remedy appropriate in cases that involve only the granting of a wage increase. *Honolulu Sporting Goods Co.*, 239 NLRB 1277 (1979), enfd. 620 F.2d 310 (9th Cir. 1980), cert. denied 449 U.S. 1034 (1980); *Skaggs Drug Centers, Inc.*, 197 NLRB 1240 (1972), enfd. 84 LRRM 2384 (9th Cir. 1973); *Tower Records*, 182 NLRB 382 (1970), enfd. mem. 79 LRRM 2736 (9th Cir. 1972). Courts have also recognized that a wage increase can be the most significant unfair labor practice committed by an employer prior to an election. *NLRB v. Anchorage Times Publishing Co.*, 637 F.2d 1359 (9th Cir. 1981), cert. denied 454 U.S. 835 (1981). Applying the Board's standard of assessing the appropriateness of a bargaining order at the time the unfair labor practices were committed, I find that a bargaining order remedy is warranted in this case. *Overnite Transportation Co.*, 329 NLRB 990 (1999); *Salvation Army Residence*, 293 NLRB 944, 945 (1989), enfd. 923 F.2d 846 (2d Cir. 1990).

Mindful that this case arises in the Second Circuit, I will address the concerns of employee turnover and the passage of time in an effort to assess the possibility of a free and uncoerced election under current conditions. *Harper Collins San Francisco v. NLRB*, 79 F.3d 1324 (2d Cir. 1996); *J.L.M., Inc. v. NLRB*, 31 F.3d 79 (2d Cir. 1994).

The record evidence shows that by October 1999, 23 of the 47 employees in the unit had left Respondent's employ, a turnover rate of 50 percent. The proffered evidence shows that by September 1, 2000, 28 employees had left, a turnover rate of 60 percent since the date of the election.<sup>22</sup> There is no evidence before me that the turnover was connected to Respondent's unfair labor practices and more than 3 years have elapsed since

the employees signed authorization cards. Under the Second Circuit's analysis, these factors militate strongly, but not conclusively, against the issuance of a bargaining order.

Respondent deployed a three-staged strategy to dramatically improve employees' wages and benefits. The first stage was to time an across-the-board wage increase during the critical period. In the words of Sanborn, "there was a lot of pressure on us to make sure this election was a favorable outcome." Support for the Union quickly evaporated, and the Union lost the election 32 to 7. After receiving the lists of employee demands, Respondent endeavored, after the election, to make sure employees' would continue to look to Respondent, and not the Union, as the source of tremendous economic benefit. Thus, stage 2 of the plan was to give employees a 401(k) plan 6 days after the election. The enormity of this benefit cannot, I think, be underestimated. A retirement program has even greater impact on employees' financial security than a wage increase. As long as one unit employee remains employed, there is the unceasing reminder that in response to a union campaign, the employer granted a retirement program which continues to secure not only the employees' futures but their families as well. Stage 3 was a follow-up to the 401(k) plan and involved the granting of five paid holidays. The testimony at trial showed that prior to this benefit, employees were not even paid for Christmas. There can be little doubt that the institutional memory is, and will continue to be, that as a reward for rejecting the Union, the quality of employees' lives vastly improved. The only manager whose name was attached to these benefits in the eyes of the employees, Steven Kress, continues as the general manager to the present.

Because traditional Board remedies will never result in a rescission of Respondent's invidiously timed largesse, and under all of the circumstances of this case, I recommend that a bargaining order issue notwithstanding the level of employee turnover and the passage of time.

#### L. The Conduct of Attorney Margolis

In the course of the hearing, attorney Margolis engaged in conduct which delayed and disrupted the orderly process of the hearing. As already noted, counsel filed an answer in which he denied jurisdictional allegations relating to McAllister Brothers as well as the labor organization status of the Union. Counsel personally represented McAllister Brothers in the representation proceeding underlying this case, signed the stipulated election agreement agreeing to jurisdiction, and participated in the hearing on objections. Counsel also represented Respondent in a previous proceeding before the Board involving the same Union with whom Respondent, prior to 1988, had an established collective bargaining relationship. *McAllister Bros.*, 312 NLRB 1121 (1993). Prior to the hearing, counsel served a subpoena on the Union which called for documents relating to its labor organization status. The Union filed a petition to revoke which necessitated a ruling by Judge Davis.

Counsel denied the allegations of single employer status asserting he was without knowledge of the meaning of the term "material times." He denied, on the same ground, the appropriateness of the bargaining unit. Yet at the opening of the hearing, counsel entered into stipulations using that identical term.

<sup>22</sup> I deny Respondent's motion to supplement the record. Not only does the Board routinely deny such motions, the evidence as proffered (60 percent turnover) does not materially alter the facts adduced at the hearing (50 percent turnover) and does not require a different result. Nevertheless, I will assume solely for the purpose of the turnover analysis that Respondent's proffered numbers are accurate.

Counsel denied the supervisory and agency status of Kress, the highest ranking official of the McAllister Brothers subsidiary and Respondent's principal witness at the objections hearing, as well as the supervisory and agency status of Sanborn and Del-Greco, senior vice presidents of MT&T. Counsel denied, at least in part, all of the allegations relating to the related representation proceeding, matters which were beyond all dispute.

It is not enough that counsel stipulated to many of these facts at the beginning of the trial. His answer led directly to the issuance of broad-based subpoenas by the General Counsel which, in turn, spawned Respondent's petitions to revoke and the attendant litigation. This case demonstrates the very real and practical problems that occur when an attorney interposes a frivolous answer. Board's Rules, Section 102.21 provides for disciplinary action against an attorney for filing an answer that is without good grounds to support it and which is interposed for delay. This section has frequently been cited by the Board in cautioning and warning attorneys against engaging in misconduct. *Graham-Windham Services*, 312 NLRB 1199 fn. 2 (1993); *Worldwide Detective Bureau*, 296 NLRB 148 fn. 2 (1989); and *M.J. Santulli Mail Services*, 281 NLRB 1288 fn. 1 (1986).

Counsel's response to the district court's order to produce the Coast Guard documents further demonstrates his obfuscatory tactics. From the time of the issuance of the complaint, counsel was aware that the General Counsel was seeking a bargaining order on a card-based majority showing. In response to the earlier petitions to revoke, the General Counsel argued that the original W-4 forms and job applications sought in the subpoenas were for the purpose of authenticating employee signatures on the authorization cards. Respondent failed to produce these documents and they became subject to the *Bannon Mills*' sanction. The General Counsel then sought the Coast Guard documents for the same purpose. Counsel's petition to revoke the latter subpoena was denied, as was his request for special permission to appeal filed with the Board. Ultimately, the district court ordered the subpoena enforced. On the day set for compliance, counsel failed to produce the original documents in Respondent's files, and a number of the copies produced were of such poor quality as to make signature comparison difficult if not impossible. Counsel's justification for producing the copies and not the originals was two-fold: first, he stated that the documents had not been previously requested, and second, he was unaware there was an issue about the legibility of the signatures. As Judge Aldrich observed in *Hedison Mfg. Co.*, 643 F.2d 32, 34 (1st Cir. 1981), "basic fairness and the orderly conduct of a hearing require at least a modicum of candor and good faith." Counsel's argument was lacking in both. Counsel was advised he could either allow the General Counsel to enter Respondent's offices and witness the retrieval of the original documents or I would postpone the matter for the General Counsel to seek contempt of the district court's ruling. Counsel elected to allow the General Counsel to observe the document retrieval and in that process, 20 additional signature-bearing Coast Guard documents were discovered, copies of which had not been produced at all. I do not suggest counsel acted inappropriately in pursuing appeals related to the Coast Guard documents or to any other ruling in

this case. In that, counsel was satisfying his obligation to zealously represent his client. Counsel is to be seriously faulted, however, for advancing arguments so lacking in merit as to be obstructive of the orderly process of the hearing.

This is not the first case in which counsel's conduct has been a subject of the Board's attention. *Salvation Army Residence*, above.<sup>23</sup> I recommend the Board warn attorney Margolis that future misconduct may warrant referral of the matter to the investigating officer for possible disciplinary proceedings under Section 102.177 of the Board's Rules, 61 Fed. Reg. 65323 (1996). See, *Bethlehem Temple Learning Center, Inc.*, 330 NLRB 1177 fn. 3 (2000).

#### M. Motion for Recusal

I have reviewed the entire record and have considered Respondent's arguments which I find to be without merit. I adhere to my previous rulings except where indicated in this decision, and I deny the motion for recusal.

#### CONCLUSIONS OF LAW

1. McAllister Towing & Transportation Company, Inc. and its wholly owned subsidiary, McAllister Brothers, Inc., (Respondent) constitute a single-integrated enterprise and a single employer within the meaning of the Act.

2. Respondent is engaged in commerce within the meaning of Sections 2(2), (6) and (7) of the Act, and has engaged in unfair labor practices affecting commerce within the meaning of Sections 2(6) and (7) of the Act.

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

4. The following employees constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time licensed and unlicensed employees on tugboats operated by Respondent regularly in the Port of New York and vicinity, defined as an area extending north to Yonkers, east to Stepping Stones, and south to the Colregs demarcation line, but excluding all captains, all shore-based and office personnel, and guards, professional employees, and supervisors as defined in the Act.

5. Since June 6, 1997, the Union has been the exclusive representative of all employees in the appropriate unit for purposes of collective bargaining within the meaning of Section 9(a) of the Act.

6. Respondent violated Section 8(a)(1) of the Act on June 6, 1997, by granting employees an across-the-board wage increase.

7. Respondent violated Section 8(a)(1) of the Act on July 8, 1997, by granting employees a 401(k) plan.

8. Respondent violated Section 8(a)(1) of the Act on August 15, 1997, by granting employees five paid holidays.

9. Since June 6, 1997, Respondent has violated Section 8(a)(1) and (5) by failing and refusing to recognize and bargain with the Union as the exclusive collective bargaining representative of employees in the appropriate unit.

<sup>23</sup> *Salvation Army*, like this case, involved a *Gissel* bargaining order.

10. Respondent violated Section 8(a)(1) and (5) by engaging in the forgoing conduct without prior notice to the Union and without affording the Union an opportunity to bargain with respect to this conduct and the effects of this conduct.

#### REMEDY

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

Respondent is required to, on request, recognize and bargain with the Union as the exclusive representative of the employees in the appropriate unit concerning their terms and conditions of employment, and to embody any understanding reached in a signed contract.

On request, Respondent must bargain with the Union concerning its decisions to grant an across-the-board wage increase, a 401(k) plan and five paid holidays, and the effects of those decisions.

Because a number of employees have left Respondent's employ since the commission of the unfair labor practices, and because current employees are, from time to time, aboard vessels for protracted periods of times, Respondent should be required to mail the notice herein to all employees in the bargaining unit who were employed by Respondent at any time since June 6, 1997.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>24</sup>

#### ORDER

Respondent McAllister Towing & Transportation Company, Inc. and its wholly owned subsidiary, McAllister Brothers, Inc. as a single integrated enterprise, Staten Island, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with the Union as the exclusive representative of the employees in the appropriate unit;

(b) Failing and refusing to bargain with the Union concerning its decisions to grant an across-the-board wage increase, a 401(k) plan and five paid holidays, and the effects of those decisions;

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

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

(a) On request, recognize and bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All full-time and regular part-time licensed and unlicensed employees on tugboats operated by Respondent regularly in the Port of New York and vicinity, defined as an area extending north to Yonkers, east to Stepping Stones, and south to the Colregs demarcation line, but excluding all captains, all shore-based and office personnel, and guards, professional employees, and supervisors as defined in the Act.

(b) On request, bargain with the Union concerning its decisions to grant an across-the-board wage increase, a 401(k) plan and five paid holidays, and the effects of those decisions.

(c) Within 14 days after service by the Region, post at its Staten Island facility and at its offices at 17 Battery Place, New York, New York copies of the attached notice marked "Appendix."<sup>25</sup> Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed any 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 June 6, 1997.

(d) Within 14 days after service by the Region, mail a copy of the attached notice marked "Appendix"<sup>26</sup> to all employees in the appropriate unit who have been employed by the Respondent at any time since June 6, 1997. The notice shall be mailed to the last known address of each of these employees after being signed by the Respondent's authorized representative.

(e) 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.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated: Washington, D.C. December 29, 2000

#### APPENDIX

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

<sup>24</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

<sup>25</sup> 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."

<sup>26</sup> If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "Mailed By Order Of The National Labor Relations Board" shall read "Mailed Pursuant To A Judgment Of The United States Court Of Appeals Enforcing An Order Of The National Labor Relations Board."

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

Section 7 of the Act gives employees these rights.

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

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

WE WILL, on request, recognize and bargain with the Local 333, United Marine Division, International Longshoremen's Association, AFL-CIO, as the exclusive collective bargaining representative of our employees in the following appropriate

unit and put in writing and sign any agreement reached on terms and conditions of employment:

All full-time and regular part-time licensed and unlicensed employees on tugboats operated by Respondent regularly in the Port of New York and vicinity, defined as an area extending north to Yonkers, east to Stepping Stones, and south to the Colregs demarcation line, but excluding all captains, all shore-based and office personnel, and guards, professional employees, and supervisors as defined in the Act.

WE WILL, on request, bargain with the Local 333, United Marine Division, International Longshoremen's Association, AFL-CIO, concerning our decisions to grant our employees an across-the-board wage increase, a 401(k) plan and five paid holidays, and the effects of those decisions.

MCALLISTER TOWING & TRANSPORTATION COMPANY, INC. AND ITS WHOLLY OWNED SUBSIDIARY, MCALLISTER BROTHERS, INC.,  
AS A SINGLE INTEGRATED ENTERPRISE