Caldor, Inc. *and* Shawn Smith and Local 888, United Food & Commercial Workers Union, AFL–CIO, Party in Interest. Case 2–CA–26441

November 24, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS COHEN AND TRUESDALE

On June 29, 1995, Administrative Law Judge Robert T. Snyder issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed cross-exceptions, a supporting brief, and an answering brief to the Respondent's exceptions.

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

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

We affirm the judge's findings of violations of Section 8(a)(1), (2), and (3) of the Act. Although the complaint alleged that the Respondent also violated Section 8(a)(1) and (2) of the Act by reprimanding employee Frances ''Terry'' Passaro for not supporting the Union (Local 888, United Food & Commercial Workers Union, AFL–CIO) and by giving Passaro an authorization card to sign on the Union's behalf, the judge did not reach these issues in his decision. For the reasons stated below, we find merit in the General Counsel's cross-exceptions to the judge's failure to find these additional violations.

The credited evidence shows that, on December 17, 1992, the Respondent directed Passaro to attend a meeting that the Union held on the Respondent's premises. During the meeting, Passaro vehemently objected to the wages and benefits that the Union said that the unit employees would receive. Passaro at one point suggested that the employees bring in another union.

The next day, December 18, the Respondent sent Passaro to the office of Richard Mardis, the Respondent's regional personnel manager of the distribution division. Mardis stated that he had walked by the conference room while the Union was conducting its meeting the previous day and that he had overheard a lot of things being said, most of them by Passaro. Mardis told Passaro that she was a negative person on the basis of what she had said at the meeting, that she needed to change her attitude, and that she had known when the Respondent hired her that it was a closed shop and that she was going to have to join the Union in order to keep her job. Mardis gave Passaro an authorization card.

In the context of this case, where the Respondent, inter alia, violated Section 8(a)(2) by unlawfully granting recognition to the Union before it hired any of the unit employees, we find that the Respondent further violated Section 8(a)(2) when Mardis threatened Passaro with discharge for failing to support the Union that the Respondent had chosen to represent its employees.[2] Because Mardis also gave Passaro an authorization card to sign on the Union's behalf, we conclude that this assistance to the Union, in context, constituted an additional 8(a)(1) and (2) violation.[3] Thus, we will modify the judge's Order and notice to reflect the additional violations we have found.

AMENDED CONCLUSIONS OF LAW

Substitute the following for Conclusion of Law 3:

''3. By granting recognition to Local 888, United Food & Commercial Workers Union, AFL–CIO as the exclusive collective-bargaining representative of its full-time and regular part-time warehouse employees employed at its Newburgh, New York facility at a time before the facility had opened for operations and before any employees had been employed in its operations, by informing its employees and applicants for employment that their employment benefits would be determined by the Respondent in conjunction with Local 888 and that Local 888 would represent them, by making its premises available for organizational meetings by Local 888 and instructing employees at its Newburgh, New York facility to attend those meetings, on working time, by instructing its employees to join and support Local 888 as a condition of continuing employment, by giving its employees union authorization cards and instructing them to sign the cards on Local 888's behalf, and by reprimanding an employee for not supporting Local 888, the Respondent has been rendering unlawful assistance and support to a labor organization in violation of Section 8(a)(1) and (2) of the Act.''

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951).

The Respondent contends that the judge erred in crediting testimony by three former employees on the ground that they gave inconsistent testimony about events that occurred at a union meeting that they attended on the Respondent's premises. We note, however, that these employees attended three different meetings which the Union (Local 888, United Food & Commercial Workers Union, AFL–CIO) held at that location on December 17, 1992.

[2] See, e.g., *Kosher Plaza Supermarket*, 313 NLRB 74, 85 (1993).

[3] See, e.g., *Famous Castings Corp.*, 301 NLRB 404, 407 (1991).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Caldor, Inc., Newburgh, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraphs 1(g) and (h) and reletter the subsequent paragraph accordingly.

''(g) Reprimanding its employees for not supporting Local 888.

''(h) Giving its employees authorization cards to sign on Local 888's behalf.''

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

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

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

WE WILL NOT grant recognition to Local 888, United Food & Commercial Workers Union, AFL–CIO or any other labor organization as the exclusive collective-bargaining representative of all full-time and regular part-time warehouse employees employed at our Newburgh, New York facility at a time before the facility had opened for operations and before any employees had been employed in its operations.

WE WILL NOT recognize and bargain with Local 888 as the exclusive representative of our employees for the purpose of collective bargaining unless and until this labor organization has been certified by the Board as the exclusive collective-bargaining representative of our employees pursuant to Section 9(c) of the Act.

WE WILL NOT enforce or give effect to our collective-bargaining agreement with Local 888 or any extension, renewal, or modification thereof, or any superseding agreement, and WE WILL NOT enforce and give effect to its union-security provision and to authorizations executed by our employees pursuant to its dues-checkoff provisions causing dues, initiation fees, assessments, or any other moneys to be deducted from employees' pay and remitted to Local 888, but nothing here requires the withdrawal or elimination of any wage increase or other benefit or terms or conditions of employment which may have been established pursuant to that agreement.

WE WILL NOT inform employees and candidates for employment that their employment benefits would be determined by us in conjunction with Local 888 and that Local 888 would represent them.

WE WILL NOT make our premises available for organizational meetings by Local 888 and WE WILL NOT instruct employees at our Newburgh, New York facility to attend such meetings and on working time.

WE WILL NOT instruct our employees to join and support Local 888 as a condition of retaining employment and to sign authorization cards on Local 888's behalf.

WE WILL NOT reprimand our employees for not supporting Local 888.

WE WILL NOT give our employees authorization cards to sign on Local 888's behalf.

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

WE WILL withdraw and withhold recognition from Local 888 as the exclusive collective-bargaining representative of all full-time and regular part-time warehouse employees employed at our Newburgh, New York facility, unless and until this labor organization has been duly certified by the Board as the exclusive collective-bargaining representative of these employees.

WE WILL reimburse all present and former employees for all initiation fees, dues, assessments or any other moneys which may have been paid to Local 888 pursuant to the union-security and dues-checkoff agreements between us and that Union, with interest.

CALDOR, INC.

Ruth Weinreb, Esq., for the General Counsel.
Winifred D. Morio, Esq. (Putney, Twombly, Hall & Hirson), for the Respondent.
Patricia McConnell, Esq. (Vladeck, Waldman, Elias & Engelhard, P.C.), for the Party in Interest.

DECISION

STATEMENT OF THE CASE

ROBERT T. SNYDER, Administrative Law Judge. This case was tried before me on June 27, 28, and 29, 1994, in New York, New York.

The complaint, as amended at trial, alleges that Caldor, Inc. (Respondent or Caldor) rendered unlawful assistance and support to the Party in Interest, Local 888, United Food & Commercial Workers Union, AFL–CIO (Local 888), in violation of Section 8(a)(1) and (2) of the Act, by various acts and conduct, including informing employee applicants prior to their employment that their employment benefits would be determined by it and Local 888, and that Local 888 would represent them, making its premises available for organizational meetings by Local 888 and instructing employees to attend, instructing employees to join and support Local 888 and reprimanding employees for not doing so, granting recognition to Local 888 as exclusive representative for unit employees at a facility even before the facility began operations, and based on a card check, entered into a collective-bargaining agreement with Local 888 for the unit employees

in the particular facility which contains a union-security clause and dues-checkoff clause, pursuant to which it has given effect to authorizations executed by unit employees and deducted dues and initiation fees from employees' paychecks, at a time when Local 888 did not represent an uncoerced majority of its unit employees. Caldor is further alleged to have violated Section 8(a)(1), (2), and (3) of the Act, by unlawfully entering and applying the terms of the collective-bargaining agreement, especially the deduction of union dues. Respondent, by its answer, denied the commission of any unfair labor practices.

Local 888, the Party in Interest, appeared by counsel, and fully participated in the trial. All parties were provided full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Counsel for the General Counsel, Respondent, and the Party in Interest each filed posttrial briefs and they have been carefully considered. On the entire record in the case, including my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION STATUS

At all material times, Respondent, a corporation with offices and places of business in New York State, including a warehouse facility in Newburgh, New York (Respondent's facility), has been engaged in the operation of retail department stores. Annually, Respondent, in conducting its business operations described, derives gross revenues in excess of $500,000, and purchases and receives at its facility goods valued in excess of $50,000 directly from points located outside the State of New York. Respondent Caldor admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Respondent admits and I find that Local 888 is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Respondent's Metropolitan New York Area Business Operations, Ongoing Relationship with Local 888, and Decision to Open a Distribution Facility in Newburgh*

Respondent operates a number of department stores in the metropolitan New York area. It also maintains a product distribution center in North Bergen, New Jersey, and another in Farmingdale, New York. Caldor maintains a series of collective-bargaining relationships with Local 888 and other locals affiliated with the same international union covering its facilities. One 3-year agreement with Local 888 covers the stores in the New York metropolitan area. Another 3-year agreement with Local 888 covers the distribution center in Farmingdale, and a third covers the distribution center in North Bergen, New Jersey.

In 1991 Caldor decided to build a new distribution center in Newburgh, New York. It was built in 1992 and began operating in November of that year with its first employees. While Francis Witt III, Respondent's vice president of labor relations, called by counsel for the General Counsel as a witness under Section 611(c) of the Federal Rules of Evidence, surprisingly and disingenuously could not specify the source of the rank-and-file employees hired for the Newburgh facility beyond agreeing that a majority were new employees, in fact, all nonsupervisory personnel were hired from the outside, while many supervisory and managerial employees were transferred from other facilities. Indeed, Witt's own pretrial affidavit, while referring to 17 managers and supervisors being transferred to Newburgh from North Bergen beginning in October 1992, makes no reference to any other employees being transferred to Newburgh from any other Respondent facilities.

B. *The Staffing of the Newburgh Facility and the Circumstances Resulting in Local 888 Achieving Recognition and Securing a Collective-Bargaining Agreement*

Respondent accepted an offer from the New York State Employment Service to utilize its offices and facilities in recruiting and interviewing applicants for hire to staff its new Newburgh facility. This process began with a series of initial interviews conducted in September 1992[1] at the state employment office in Newburgh.

Witt first denied having such discussions, but after being referred to his pretrial affidavit, agreed that in conjunction with discussions with Local 888 during the fall about other collective-bargaining relationships, there were discussions about some terms which may apply to Newburgh. Witt recalled having discussions regarding the health and welfare contributions which would apply in the event Local 888 became bargaining representative. They also discussed wage rates which would apply as well as sick leave. Witt emphasized these discussions would only be effective if the employees selected the Union to represent them and a contract would not be negotiated until after a majority status was established.

Although Witt at first denied a tentative agreement resulted from these discussions, insisting only that there may have been a summary or listing of the subjects discussed, he now acknowledged, consistent with his affidavit, ''to the extent we reduced anything to writing, I believe we set down tentatives concerning the health benefits, the wage rate and the sick pay.'' Witt further agreed that a summary of some of the terms of the agreement may have been arrived at in written form. In these meetings, Local 888 was represented by Al Guglielmo, its secretary-treasurer.

Witt was shown a three-page undated and unsigned document headed ''Memorandum of Agreement'' and containing the following introductory and defining language: ''The following summarizes the Agreement between Caldor, Inc. [Employer] and VFCW Local 888 [the Union] covering employees of the Caldor Distribution Center in Newburgh, New York.'' He denied he had seen it before the week prior to the hearing when he was shown it by counsel.

A review of its contents discloses that it itemizes 14 separate bargaining subjects, 12 of which in language and understanding are identical to the same subject areas included in the collective-bargaining agreement Caldor ultimately entered with Local 888 covering the Newburgh facility. These subjects deal with bargaining unit, seasonal employees, union security, rest periods, workweek, overtime, seniority, holidays, personal holidays, vacations, jury duty, and wages. Only the trial period provision underwent a substantial

[1] All dates shall refer to 1992 unless otherwise noted.

change, being reduced from 6 months in the unsigned and undated memorandum to 90 calendar days in the full agreement. Another provision, covering no strikes or lockouts, with reference to strikes, prohibited them without limitation in the memorandum, while in the agreement prohibited them ''pending the settlement of any grievances between the parties pursuant to the grievance and arbitration provisions of this Agreement.''

A later witness for counsel for the General Counsel, then employee Frances Passaro, testified without contradiction that she had received the copy of the memorandum shown Witt from Guglielmo at a meeting she attended at the Newburgh facility along with other employees which she was directed to attend to meet the Local 888 official on December 17, 1992. The memorandum Passaro received contained a handwritten underlining of the word Newburgh in the introductory and defining paragraph and handwritten notes on the last page listing dues as $5.68 for ''full-time and $4.21 for ''part-time.'' The inference is reasonable that these notations were made by Guglielmo himself after the memorandum was prepared but before its distribution to Passaro. Guglielmo was not called as a witness by either the Party in Interest or Respondent and the statements attributed to him by Passaro and other witnesses stand unopposed on this record and are credited.

At a later point in the hearing, before resting her case-in-chief, counsel for the General Counsel offered into evidence another printed copy of the memorandum of agreement which counsel for the Union represented in the record was produced for her from the Union's files in response to the subpoena which had sought, inter alia, ''copies of any collective-bargaining agreements, memoranda of understandings, written agreements which Caldor Inc. (the Respondent) entered into with Local 888, United Food & Commercial Workers Union, AFL–CIO (the Union), concerning Respondent's Newburgh warehouse facility, during the period from October 1, 1992 until the present.'' I rejected receipt of the document in the absence of establishment of its authenticity and because a copy had already been received during Passaro's testimony (Tr. 442–443). I now believe that ruling to have been made in error and now reverse it, and receive the memorandum in evidence as General Counsel's Exhibit 9. It is clear that the document accompanied by union counsel's representation corroborates Passaro's testimony that the memorandum was represented by Union Agent Guglielmo as the product of an understanding earlier arrived at with Caldor's which was enforceable between them and binding on the unit employees, requiring them to comply with its union-security clause. Because it was produced from the Union's files, its authenticity is already established.

After the initial interviews a series of second and third interviews were conducted of applicants for employment at Newburgh in a continuing winnowing process which ended with an informational briefing and individual offers of employment to finalists in the process.

Frances Passaro, also known as Terry, testified that she applied for a job at Respondent's facility at the state employment office in Newburgh. Shortly afterward she was called for an interview in the latter part of September 1992. She was interviewed that day by Richard Mardis, then regional personnel manager of Caldor's distribution division, and by Chris Kent, then freight supervisor at the Newburgh facility, also described by Passaro as supervisor for bulk breakdown. She met first with Mardis who reviewed her application and provided information about Caldor. She asked him did he know what the salary would be and the benefits. Mardis replied that at that time their Union, Local 888, could not give them that information because they did not yet put together a contract, that Local 888 would come later on in the facility to discuss those issues. Mardis also told her that Local 888 was Caldor's Union and that they would meet with us later about the salary and the benefits.

In a second interview that day, conducted by Kent, he reviewed her employment history and asked her questions about material in her application.

Passaro returned to the state office in Newburgh for more interviews in the middle of October. She met that day with Mardis, Jean Pardee, personnel manager of the Newburgh facility, and Mike Berundy, a supervisor. She first met with Berundy who reviewed her application and told her he was impressed with it. When she asked about wages, he could not give her a figure, but estimated she would likely be offered a salary between $8 and $9 an hour. She met briefly thereafter with Mardis and Pardee but only to take a written standardized test and to be referred to a medical lab for a urine analysis.

Passaro next met with Caldor officials at the end of October, when she was invited to a meeting at the Days Inn Hotel in Newburgh. Present were between 20 to 30 applicants, as well as Mardis, Pardee, and Jeff Driscoll, supervisor for receiving. Mardis addressed the group initially, then Pardee spoke to the group about safety, clothing, and played some videotapes. Later, individual applicants were invited to meet Caldor representatives individually where job offers were made.

Passaro was called to meet with Mardis. He offered her a job at $7.50 an hour. He explained her work hours and days, department assigned, and clothing she was expected to wear. Passaro asked about benefits. Mardis stipulated that Local 888 was going to be their Union. However, at this time they did not have a contract put together and they would have to meet with the employees later on while they were working at the facility to discuss those issues with them.

Passaro started working for Caldor on November 23 as a general warehouse employee. She started in bulk breakdown, transporting goods and loading pallets. She then became a transporter for the shipping department and finally, a loader for the shipping dock. On December 17, her supervisor, Gene McIntyre, spoke to her on the shipping dock floor. He told her she had to go to a union meeting at 3:30, the whole shipping department was going at that time. At this time, Passaro was a transporter for shipping and worked an 8:30 a.m. to 4:30 p.m. shift. Passaro explained to McIntyre that she did not get off work until 4:30, that she was scheduled to set up the shipping lanes for the next day from 3:30 to 4:30 p.m. and that she needed his permission to leave the floor and this scheduled assignment. McIntyre gave her permission to leave the floor.

Passaro attended the meeting along with 20–30 employees, many from her own department, shipping, but a few from other departments. She was not on a break when she attended. The meeting, held in a conference room, was addressed by Al Guglielmo. There were no Caldor officials or

supervisors present. Giglielmo first introduced himself to the assembled employees as the treasurer of Local 888. He also introduced one or more other union representatives. Then he proceeded to read from a two-, three-, or four-page document which he was holding. He first described the document as a memorandum of agreement, a contract put together by the North Bergen facility of Caldor's and Local 888 for the Newburgh Distribution Center. He then read the entire document. The terms of employment covered in the memorandum have been previously described. The one, entitled union security, which Guglielmo read, provided: ''[U]nit employees shall be required to join and remain members of the Union within ninety (90) days after hire.'' The provision on personal holidays provided that employees would be eligible for 1 paid personal day after 6 months of employment and 2 days after the completion of 1 year. In terms of wage increases, the memorandum provided and Guglielmo read that employees would receive a total of 70-cent-per-hour increases after 2 years of employment. Passaro recalled that Guglielmo also discussed their sick time, a provision for 1 day sick leave, although that benefit is not described in the memorandum. The collective-bargaining agreement Caldor and Local 888 entered notes it was made on November 1 and it was made effective from November 1, 1992, to January 31, 1996. The parties apparently did not sign it until January 31, 1993. In the full agreement, employees are eligible for 1 sick day after 1 year, and 2 each contract year thereafter.

Passaro expressed her views very freely at this meeting. She said she was upset at the fact that there was only 1 sick day a year and 1 personal day a year. (Actually, 1 day each until a year's service is reached when the benefits became 2 days). Guglielmo responded ''that it's in the contract, it's binding, there's nothing you can do about it.''

After this exchange, which occurred during the reading of the document, Guglielmo went on to complete a reading of the memorandum, the last item of which concerned the wage increases. In Passaro's recollection the increases totaled 75 cents within a 2-year period. At the meeting, she said ''this outraged us.'' Passaro went on, again we asked how could the North Bergen put together a contract for our facility without us knowing about it. We had nothing to say about the contract whatsoever.

Guglielmo responded to this criticism, replying, ''you had no right to say anything,'' that North Bergen was also with Local 888, and that was also their union and Caldor has had a contract there for many years and that this would also be a part of that contract.

Again, at this point, Passaro said, ''let's bring in another union because this is ridiculous. We have rights here, I know we do. Something has got to be done about this. There is no way they can put together a contract for us. The pay scale down there, in North Bergen, is a lot different than it is up in our area. So how could they possibly have put together a contract for Newburgh.'' As Passaro explained, she was extremely outraged at this because ''no one can put together a contract for where I work unless my people agree on it, and no one in my facility agreed on that.'' Passaro named other employees who also spoke up in protest, including James Washington, and Sharon Burelli, who walked out saying ''this is ridiculous, I don't even have time for this, this is outrageous.''

At one point, Passaro said she was angry at Caldor over the fact that they had a well-publicized ribbon-cutting ceremony prior to this meeting, where they announced that they had made $2 billion that year, ''we had to kiss up to the Company, and yet they couldn't afford an extra sick day off, they couldn't give us more than seventy-five cents within two years.''

After these criticisms, Guglielmo left the room and came back and said he had just spoken with Jim Lucas from Local 888. Lucas said there was no negotiating this contract, ''it is what it is.'' At the meeting's conclusion, Guglielmo said ''you all knew that Local 888 was going to be your union and that it was going to be a closed shop, that you had to sign the applications, if you didn't within a ninety day period you would be terminated.'' At this point, Passaro asked him for a copy of the memorandum and he left and returned and gave her three copies. It was one of the copies which Passaro received, with the unidentified handwriting on it, which was then received in evidence. By the time the meeting concluded it was around 5 p.m.

At the meeting, there was a table with some Local 888 membership applications on it as well as information about a MasterCard or Visa credit card which could be obtained through the Union. Passaro did not sign a membership application.

The following day, December 18, Passaro was asked to go to Mardis' office. In his office they were alone and seated. He asked her if she knew what their meeting was about. He went on, ''I believe you have questions about the union.'' She said no. He said, ''well, I think you do,'' and she replied, ''no, I do not.'' He went on, ''well, Terry, I hear differently. I happened to be walking by the conference room where you were yesterday and I overheard a lot of things being said, most of them coming from you.'' He told her she was a negative person for what she was saying. She needed to change her attitude. He couldn't believe some of the things she was saying.

Passaro said she thought that her union meetings were private. Mardis replied, ''your [sic] reading too much into this. I just happened to be walking by.'' However, from the detail Mardis supplied about the meeting, including her conversation about bringing in other unions, among others of her comments, Passaro concluded that Mardis must have obtained his information from talking with Al Guglielmo.

Mardis also referred to her comments made at the meeting about Caldor's publicized ceremony announcing its huge success that year, in contrast to the paltry employee benefits and wages Local 888 was announcing, telling her there was no reason for her to say that. Mardis also said she was a negative person because of a problem she had with Pardee over a Christmas committee, and her attitude really had to change. He said, ''you knew when you came to Caldor that Local 888 was our union, you knew it was a closed shop, and you know you were going to have to join the union, within a ninety day period, or be out of a job.''

Passaro started crying, feeling that her privacy had been violated. Mardis left and returned with a tissue for Passaro, apologized but said he had to do this, ''this is my job'' and asked her if she was ready to sign the membership application for Local 888. Passaro said yes. He pushed the application in front of her with a pen on top and she proceeded to fill it out and sign it. Passaro felt she had to sign, particularly

after being told by Caldor's regional personnel manager that a condition of being hired was to join the Union, and she had to sign in front of that manager. Eventually union dues were deducted from her wages. No election was conducted to determine whether Local 888 would become the Caldor employees' bargaining agent.

During her cross-examination, Passaro acknowledged that a few days after the union meeting she was called into the personnel office because she had forgotten to sign another portion of the union application. The union application which had been presented to the employees, including Passaro, contained three parts, a top part which was the application for membership, a middle portion, entitled ''Authorization and Assignment'' in which employees voluntarily authorize their employer to deduct from their wages regular membership dues, initiation fees, and assessments with the limitation required by law, and a third bottom part, separated by perforation, in which the employer lists personal information and names a beneficiary for purposes of benefits due under the union's health and welfare fund and pension plan. Passaro's two-part application, the third portion was unavailable and probably on file at the Union's fund office, show that she dated the membership portion November 18, 1992, in error, and when, a day or two later, was approached by the personnel office, corrected the date by entering now on the Authorization and Assignment portion ''this 18 day of 12, 1992'' and signed it. This is the portion which she had failed to complete on December 18 in Mardis' office. Passaro wanted the completed form to show that at least a portion was signed and dated by the date of her meeting with Mardis even though she had been approached by personnel a few days later.

The foregoing are the factual conclusions I draw from the extended cross- and recross-examination by Respondent counsel, and redirect examination by the General Counsel on the basis of which Respondent urges Passaro was shown to be not credible. I make no such finding. I find Passaro's recital, in spite of her extensive and determined cross-examination by both Respondent and union counsel, honest, straightforward, and frank and she is credited with respect to the union meeting, particularly in the absence of any contrary testimony, and her testimony about the circumstances of her signing the Union's application, and her conversations with both McIntyre and Mardis, about which more will be said. Particularly, Respondent's attempts to show conflicts between her pretrial affidavit and testimony, and within her testimony, about where she was when she was approached by personnel to complete her application is unpersuasive and unavailing. At some later point in her testimony, Passaro believed she had corrected the date on the application to December 17, the date of the union meeting, because of her fear of losing her job from her December 18 talk with Mardis. At the time of this testimony the Union had not yet produced under subpoena the second portion of her application. This testimony is in error, but without government counsel having the second portion of the application available, not produced until 2 days later, the witness' memory could not have been refreshed or clarified by reference to it. (Tr. 282; 296–298.) The facts show she did correct the month from November to December on the second portion and did enter a date on which she met with Mardis and was cajoled and coerced to sign, consistent with the date she signed the first part. In view of all these facts and circumstances, her error in this regard is not significant and does not warrant her impeachment.

Furthermore, the facts developed regarding Passaro's later separation from Caldor's employ neither show a vindictive person compelled to prevaricate out of bias nor a person whose later conduct was inconsistent with her strong anti-Local 888 stance earlier. It appears that the Union subsequently sought out Passaro to act as steward, she was first appointed in January 1993 and that she was later appointed head shop steward over three or four other elected employee stewards for the unit employed at the Newburgh facility, and in that capacity tried to enforce the contract. Because of her active union role Giglielmo told her in agreement with her own view, that he thought she was being harassed by Caldor. Passaro agreed he told her she would make a good union representative but needed more experience, but she denied she had asked him for a paid union position. On May 21, 1993, Passaro was told by Caldor she was going to be terminated. Passaro disputed that in lieu of her being terminated she agreed, apparently voluntarily, to resign with 1 week's severance pay. She later explained that the Company's conduct toward her was intimidating and left her with few options. Without advance notice, Mardis presented a letter to her on Caldor stationery dated May 21 in which she states she resigned effective May 28, and she understands she may use Mardis as a reference for future employment opportunities. Earlier that day, Passaro had been told she was being terminated because her attendance was poor. When later presented with this letter by Mardis, she was told these were the terms of her termination and the Company would not protest her receiving unemployment benefits and she would be receiving a week's severance pay, apparently the pay from May 21–28. Under these circumstances, Passaro signed, but, because she believed she had been coerced to leave and because of her union activities, she later filed an unfair labor practice charge against Caldor alleging her May 21 separation as an unlawful discharge under the Act. That charge was either later withdrawn or dismissed.

These facts are not inconsistent with Passaro's earlier strong anti-Local 888 posture. They are consistent with Passaro's evident desire to represent employee interests with her employer, in this instance, through the Union which had become established as his bargaining representative, whether lawfully or not, and was the only vehicle for furthering employee rights. In my considered judgment the circumstances of Passaro's separation from Caldor have not colored her testimony and she has not exhibited a bias which would discredit her generally trustworthy and evidently deeply felt narrative.

Michelle Abbruzzese also testified in support of the complaint. She was employed as a general warehouse worker by Caldor at the Newburgh facility from her hire in November 1992 until her leaving in September 1993. Her work schedule was from 7 a.m. to 3:30 p.m. She worked in the bulk breakdown area breaking down freight coming in to receiving for shipment from shipping areas to individual stores. After an initial interview at the state employment office in Newburgh, she was called back for a second interview to the same office 2 weeks later. She met Mardis who reviewed her application, and told her she would be considered for a lead position. At her final interview she was told how much she

was getting paid. Abbruzzese asked if there was any kind of union and what kind of benefits there were and how they worked that. Mardis said once she was hired they would let her know. She next met George Walker, production manager, who gave her a rundown on Caldor's and how they run the distribution center in Bergen County. When questioned he also said her benefits would be explained once she was hired.

Her third interview took place, like Passaro's, at Days Inn in Newburgh at the end of October. Present were 15 to 20 other applicants. Mardis first addressed the group, followed by Pardee, who showed a film on loss prevention and safety equipment. Later, she met privately with Mardis at the back of the room. He wrote down a wage figure she was being offered for a lead position and slipped the paper to her. Once again she asked about benefits. This time he said once she was hired someone from the Union would come in and speak to them. Abbruzzese told him she would get back to him on the offer. She did accept and started work on November 20.

On a day in December, while she was in the bulk breakdown area of the Newburgh facility, with one other employee present, her supervisor, Chris Kent, told her that someone from the Union would come in and talk to all of them, he didn't have any specific information. Sometime later that month, she had come in early to work and was told by Kent there was a union meeting that afternoon. After lunch that day, Mardis and Kent told the bulk breakdown employees that the Union was going to be in the conference room at 2 p.m. and that they had to attend the meeting.

At the meeting were 15 to 20 other employees. No supervisors were present. Al Guglielmo addressed the group. He told them he was from Local 888 out of Bergen. He was Caldor's Union. He proceeded to tell them about benefits and raises. He had with him a benefit booklet and a copy of a fairly thin contract. When they entered they were given union cards. At some point the employees were told to sign them and fill them out and leave them at the end of the meeting. Abbruzzese signed a union membership application at the union meeting held on December 17 as did some of the others present. The meeting lasted approximately 2 hours during which the various benefits were presented and discussed. Most of the employees asked for a copy of the contract Guglielmo appeared to be reading from, but they were told he didn't have any to distribute.

Abbruzzese also related a conversation held with Mardis 5 minutes prior to the union meeting. She was with two other employees at the time. Mardis told them that their jobs were Union and he wanted them to go with the Union.

Caldor started deducting dues from her pay sometime in February 1993.

During her cross-examination, Abbruzzese agreed that the Union never said at the meeting that they, the employees, had to join the Union to keep their jobs, but they implied it. That implication very likely arose from Guglielmo's reading of the union-security provision contained in the memorandum of agreement and carried over along with almost all other of its terms into the collective-bargaining agreement entered early in the new year.

At third employee witness, Thomas Holt, testified that he had worked in bulk breakdown for Caldor at the Newburgh facility from November 23, 1992, to January 1994. His work hours were from 7 a.m. to 3:30 p.m., Monday through Friday. Chris Kent was his supervisor. After a first interview conducted by Pardee in early October, Holt met with Pardee again, Mardis, and McIntyre the following week. At the second meeting with Pardee, when Holt asked if there would be benefits, Pardee said there would be and that there would be a union job. At the interview with Mardis and McIntyre which followed that day, his work experience and job habits in past jobs were discussed. At his third interview, he was invited along with approximately 30 other employees to the Days Inn. Mardis, Pardee, and a third Caldor representative, the head of loss prevention, each addressed the group. Later that day, Pardee met privately with him and gave him a packet containing a job offer, which included his department, starting date, and salary. Pardee also told him there would be a union and there would be benefits but they would come up later.

After starting work, later, on or about December 17, Mardis sent him and other employees into a union meeting, telling them they had to attend. The meeting took place at approximately 3 p.m. in the afternoon. There were five other employees present, including Ricky Williams. No supervisors were present. Al Guglielmo, accompanied by another union agent, addressed the group. He handed out information about benefits they would be receiving. He went over information about their union dues, he briefly mentioned a contract and told them how many personal days, sick time, and pay raises they will receive. While talking he held a document in his hand. He said the contract was negotiated out of the North Bergen facility but it was pertaining to Newburgh. At the end of the meeting he handed out union cards and said the employees had to sign them. An employee asked, ''what if we do not sign the union cards.'' Guglielmo replied, ''if we don't sign we would not be able to work.''

Guglielmo also distributed health benefit booklets to the assembled employees. Holt signed the union membership application distributed to him at the meeting. He dated the card December 16, 1992.

Immediately following the meeting, Holt was present and heard fellow employee Ricky Williams ask Supervisor George Walker if it was true what they said, if we did not sign the union cards that we would not work and Walker responded that was true. Dues were deducted from Holt's pay starting 90 days after he began employment.

The Local 888 Health Fund booklet which Holt received at the union meeting was later produced and received in evidence. In Holt's credited testimony, it was the same booklet as one Holt later received from Pardee at a meeting called a few months later at which new employees were provided with the booklets and its contents and the benefits were reviewed.

Local 888, the Party in Interest, offered no testimony. Respondent called a number of witnesses in its defense.

Mardis confirmed that while roughly two-thirds of the management staff for Newburgh were people who had previously been employed at the North Bergen Distribution Center, the remaining staff, including all unit employees, were recruited from outside sources.

Mardis testified that after the three or four information sessions held in November, final candidates were individually extended job offers by either Pardee or himself in the back of the room. In his case, Mardis provided a specific starting date, when and where to report, a specific work schedule and

their specific rate of pay. In response to a question as to whether he discussed anything else with successful applicants, Mardis said no, to the best of his recollection.

As a regional personnel manager for Caldor, he had constant contact with Max Bruny, senior business agent for Local 888 at the North Bergen Distribution Center. Sometime in September, Bruny informed him that his boss, Al Guglielmo, would be greatly interested in organizing the Newburgh facility. Mardis said, ''I appreciate that and Mr. Guglielmo is free to give me a phone call.'' Then, in late October or early November, Guglielmo telephoned him to ask permission to come visit the facility. Mardis told him ''when you're ready to come, give me a call.'' A week later, Guglielmo called asking to come by, requesting a tour of the facility and an opportunity to meet with some of Caldor's associates.

Guglielmo came to Newburgh in the second or third week of November. Security informed him Local 888 representatives had arrived. Mardis met Bruny and was introduced to other business agents with him including Guglielmo. They first took a tour and then they asked for an area in the building to meet (with employees) and Mardis provided such a location, on the first visit it was the training room.

Before this visit Mardis informed Caldor supervisors that Local 888 representatives would be visiting, ''they have to become familiar with our building and that they, in fact, want to meet with some of our associates.'' (Tr. 494.) He went on, that if they had the opportunity to please allow their associates to meet with them. When informing the supervisors, Mardis was aware that Caldor was going to set them up in the training room and they would be available there. Mardis denied telling supervisors to tell employees that they had to attend these meetings.

When asked if he had told Passaro in response to her questioning him about benefits that the Union had not yet put together a contract and it would come in later to discuss benefits, Mardis responded he did not recall interviewing Passaro and, further, did not recall telling this to any employee. At first Mardis testified he did not recall telling any employee in a job interview that Local 888 was Caldor's union and its representatives would come to discuss issues with them. After Respondent's attorney suggested Mardis had denied saying this, Mardis did deny making such statements (Tr. 498). Yet, Mardis acknowledged that Local 888 was indeed Caldor's Union, at North Bergen, and many store locations around New York.

Mardis denied telling Passaro that she had to sign a Local 888 card, or giving her such a card. Mardis testified that Passaro approached him in the third week of December, saying she had just left the meeting headed up by Al Guglielmo and you have a lot of very unhappy people on your hands, that Local 888 was a joke, that the benefits were a joke. She said they, the union representatives, were very unprofessional, that they were rude and you really need to know about this. Mardis thanked her for telling him.

The following day, Passaro approached him and asked if he had done anything about this. Mardis asked her up to his office to talk. In the office, Passaro said she got the feeling that she was being singled out and was being intimidated because she spoke out against Local 888. He told her no, he wanted to talk about her attitude. He had discussions with Gene McIntyre, the operations manager, who felt she possessed a poor attitude. McIntyre had told him she had a lot of potential and was a good transporter and worked hard, but she became negative. Mardis told her she had potential at the Company. He denied giving her or any other employee a Local 888 card and telling her to sign it. He also could not recall telling Abbruzzese she had to attend a union meeting, answering this way twice in succession. Neither could Mardis recall whether or not he told Abbruzzese and another employee that the jobs were union jobs and they had to go with Local 888. When then asked again by Respondent counsel if he had made these statements, Mardis responded, ''no, I would not.'' (Tr. 506.) In this instance as well as Mardis' initial and uninfluenced response to the question about telling employees that Local 888 was their Union and union agents would come to discuss benefits with them, I credit his initial responses and not his later awkward avoidance of a direct denial. In both cases in denying any recollection Mardis was seeking to avoid an outright fabrication, and in only one of the three instances I cite did Mardis utter an outright denial, after counsel suggested he had already done so. Mardis' struggle to avoid untruths and misrepresentations led him to prevaricate, to the extent he could not even recall interviewing and offering a job to Passaro, an employee whose presence and antiunion and later prounion advocacy has played a central role in this case and Caldor's and Mardis' personal involvement and Caldor's potential liability. I cannot credit such a witness and do not do so here.

I have previously credited, generally, Passaro's account of their interchanges, among others, and find that her recital accords much more with the underlying circumstances and events. For example, an employee of such admitted hostility and independent stance would not have signed a union card the day following the Union's coercive presentation unless there had been an intervening event of some moment, the event Passaro described of her personal meeting with Mardis at which he reminded her of what he had told her and other employees, of the Union's status at Caldor and the necessity of her supporting it if she wished to remain employed. For the same reasons, Abbruzzese is credited in her version of her interchanges with Mardis, as is Holt as against Mardis' denial that he ever told him he had to attend the Local 888 meeting.

During his cross-examination, Mardis was nonresponsive and evasive when questioned initially about what he told successful applicants about benefits when they asked after the information session when he extended job offers. His response was that such discussion was inappropriate throughout the interviewing process (Tr. 517–581). It was clear that the question related to the time job offers were made (Tr. 516). Eventually, Mardis replied that he informed successful applicants who asked about benefits that Caldor has a historical relationship with Local 888, United Food & Commercial Workers and that ''you would[2] have an opportunity to meet with them sometime in the future.'' He noted all of the employees being hired were on a probationary status for about 90 days. Mardis was not aware of any provision for benefits for the new employees on completion of the probationary period.

[2] Mardis at first used the phrase ''may have the opportunity to meet with Local 888'' but later changed it to ''would have the opportunity'' (Tr. 521, 540).

It is significant that Mardis responded to benefit inquires of applicants who would almost immediately be starting work, with reference to the historical relationship with the Union recognized at North Bergen and many local stores. The clear implication of even these admitted remarks were that the employee benefit package was contingent on Local 888 becoming their bargaining representative. This implication is strongly reinforced by the total absence of any benefit plan or arrangement for employees at the time of their hire independent of a union-negotiated plan. It is also significant that Mardis here referred to a 90-day probationary period effective in November, at a time when the memorandum of agreement refers to a 6-month trial period and the collective-bargaining agreement's term of 90 days had ostensibly not yet been negotiated or agreed on. This is evidence that the final agreement with the Union had already been reached, if not fully executed.

Mardis explained that Al Guglielmo met about five times with employees with his approval. He set aside the training room for this purpose. He told supervisors to tell employees that Local 888 was coming to the facility each time Guglielmo called to say he was coming.

Jean Pardee could not recall interviewing or making a job offer to Tim Holt, but denied, generally, that she told any employees while making job offers that this was a union company and benefits would be union benefits. Pardee testified she told these employees who asked that she did not have any specific information on the benefits package.

Pardee previously worked 2 years as personnel manager at Caldor's Norwalk, Connecticut store, a year at central headquarters, 2 years at the Newburgh facility and, was, at the time of her testimony, personnel manager at the West Norwalk, Connecticut store. At each store and facility, Pardee had dealings with the Local 888 shop steward and limited contact with Guglielmo, which increased during her last 6 months at Newburgh which ended in May 1994.

Pardee saw union agents at the Newburgh facility in November and December 1992, including Guglielmo and Bruny. On one occasion they were touring the facility with Mardis, and on another they were in the training room next to her own office on the first floor, and employees were coming in and out.

In terms of benefits, at the time job offers were extended in late October and early November, Mardis informed her he did not have any specific information about benefits. She finally learned about benefits for the Newburgh employees in February 1993 after she was told there had been an election of the Union and that they would be union associates. I do not credit Pardee. It is evident that Pardee, through Mardis, was knowledgeable about the Company's plan, based on its prior meetings and negotiations with the Union, and its grant of permission to meet employees in the facility after their hire under direction from Caldor's, that employee benefits would be determined based on the terms of the agreement reached with the Union, which could not be legitimately announced on their hire. Pardee's comments that she ''had to assume they would offer Caldor benefits but I wasn't in a position nor had I been told that'' is disingenuous coming from its personnel manager on the eve of the employees' hire. Holt's version of their conversation at his employment offer, which Pardee could not even recall, is credited.

During the second day of hearing, counsel for the General Counsel moved to add the names of Chris Kent and Gene McIntyre as supervisors and agents of Respondent and who, in addition to Mardis, on behalf of Respondent, instructed employees to attend union organizational meetings at its facility in violation of Section 8(a)(1) and (2) of the Act. I granted the motion as to Kent, but reserved ruling as to McIntyre, because the witness who had implicated him, Passaro, had already left the stand and been excused. Later testimony established McIntyre's status as supervisor of Passaro at one time, in responsibly directing her work activities, and in successfully recommending employee candidates for hire after interviewing them at second and third stage interview and Respondent did not dispute his supervisory status. Furthermore, McIntyre testified for Respondent and was examined and cross-examined as to his alleged role in directing employees, in particular Passaro, to meet with union representatives at the facility. Thus, I have no problem now in granting the General Counsel's motion to include his alleged conduct in the case; in the alternative, the issues involving McIntyre were fully litigated.

McIntyre, who started work with Caldor in August 1992, was receiving manager at the Newburgh facility at the time of his testimony. He had been hired for the Newburgh facility in 1992 but had spent 2-1/2 months at the North Bergen facility before Newburgh was ready to operate in the fall of 1992. McIntyre was shipping supervisor in December 1992. According to McIntyre, in early December, Mardis had told him that Local 888 representatives would be in the building, but not to get involved with them, they were going to be on the floor, don't worry about it. This testimony clearly is incomplete and misleading since the statement attributed to Mardis does not include, inconsistent with Mardis' own testimony, any mention of the fact that the union agents wanted an opportunity to meet with employees and that McIntyre should permit employees to do so.

McIntyre denied telling employees that they had to attend these union meetings. In one instance, he told Frank Scalzo, a lead associate and warehouse employee under him, who had asked him if he could go to see the Union, that when he got finished with the specific project he was working on, he could go. Terry Passaro did not start working for him until mid-January 1993. In December, he had an eight-man shipping staff that worked for him. Thus, according to McIntyre, Passaro did not work for him in mid-December when she claimed he gave her permission to leave work to attend the union meeting. Yet, McIntyre did not deny he told her she could remain on the clock and attend the meeting, but only that he didn't remember having such a discussion with her about the Union. McIntyre did insist in any event, that he lacked authority to permit her to stay on the clock to attend, and would have had to refer the matter to his supervisors.

On cross-examination, McIntyre related that during the interviewing process, in late October and early November, Mardis told him that if candidates asked about benefits, refer them to personnel because none of that's resolved yet. McIntyre concluded the benefit package hadn't been put together yet.

During the hearing, I sustained Respondent objection made to inquires of certain General Counsel witnesses regarding whether they were on breaktime during their attendance at

union meetings held at the Newburgh facility. At the time, I concluded that whether these meetings were held on working time was legally significant and should have been pleaded in the complaint and was not. I have reexamined these rulings and now conclude that the time of the meetings is rather a matter of evidence in support of the complaint allegation. I find it unnecessary to reverse these rulings however, since it is clear on this record in light of Passaro's testimony made without objection that she attended while on worktime, as well her and other employee witnesses' testimony that the union meetings consumed 1-1/2 hours or more of time, at least an hour of which was during their normal workday, that the meetings took place during the employees' regular workday, during which time they were excused, indeed directed, to attend.

McIntyre's testimony that he was not Passaro's supervisor at the time she claimed she sought his permission to attend during a scheduled assignment, is not credited. McIntyre's testimony and Respondent's evidence is not specific or detailed enough to satisfy its burden on this point. Passaro testified that although she started in bulk breakdown, a receiving function, on a 7:30 a.m. to 3:30 p.m. shift, after a week, by the end of November, she had been transferred into the shipping department as a transporter, onto an 8:30 a.m. to 4:30 p.m. shift. Respondent later produced no evidence, including records, to dispute this. Later, apparently by sometime in December, she became a loader on the shipping dock. McIntyre was shipping supervisor in December. Passaro testified her conversation with McIntyre took place on the shipping dock floor. If McIntyre was not supervisor of employees on the shipping floor he did not so testify. Furthermore, Passaro also testified that the whole shipping department was going to the union meeting held at 3:30 p.m. on December 17. Neither McIntyre nor Mardis testified to any other supervisor or person in authority in shipping whom Passaro could consult about her attendance. Thus, McIntyre's testimony that he was in charge of the shipping staff, consisting then of eight males, is not determinative of his relationship to Passaro as a shipping department employee starting in December. Finally, whether or not McIntyre had authority to release employees to attend, he did not dispute Passaro's testimony that he did so, but only that he could not recall doing so. Passaro, whose testimony, generally, has been earlier credited, is credited here as to her conversation with McIntyre.

Christopher Kent, in December 1992, was freight supervisor, in charge of 15 or 16 employees who were assigned to break down incoming freight for shipment out to various stores. At the time there was little incoming freight, so Kent was primarily training people to operate machinery. Interestingly, while Kent placed Passaro as one of the employees originally assigned to his group, he noted that they weren't working directly for him in November/December 1992, but were working in other departments doing different tasks, including spending the day with Gene McIntyre, learning how to drive transporter machines, a function which Passaro credibly testified she took on a regular basis at the beginning of December. Abbruzzese had been assigned as his lead associate when he started at Newburgh in November but she didn't really begin functioning as such until probably beginning in January 1993. At the time of the hearing Kent was the warehouse management systems manager. While Respondent denied Kent's supervisory status at the time his name was added to the complaint, I conclude that the record supports such status for him. Respondent's real defense is to his inclusion as an agent to instruct employees to attend union meetings at the facility.

Kent denied having any conversation with Abbruzzese about attending a union meeting at the Newburgh facility, or directing her, or hearing Mardis direct her, to attend. He could not recall whether any employees asked him whether they could attend such a meeting or having any of his subordinate employees attend. In view of Mardis' testimony regarding his instructions to the supervisory staff to permit employees to attend the union meetings, I conclude, that Kent's recollection is faulty and, further, I find, contrary to Kent's negative response, that in December he did, indeed, inform Abbruzzese, as his leadperson, that someone from the Union would be coming to the facility to talk to them, and, later that month, was present with Mardis when they directed the receiving staff to attend a union meeting at 2 p.m.

Kent struck me, particularly from his account of being a new supervisor in a brand new building and anxious to succeed, that he would have taken special pains to satisfy the concerns of his superior, Personnel Manager Mardis, that the receiving employees attend the union meeting, listen to the union presentation, and support the Union so that its demands for an agreement would be supported by a majority showing. While Kent wanted to concentrate on his functioning in the workplace he had to take account of these employer interests.

George Walker, whose name was also added to the complaint, over Respondent's objection, as a supervisor under the Act and an agent of Respondent acting on its behalf, was a first stage interviewer for Respondent in October. In the period of October–December 1992, Walker was operations manager for the Newburgh facility. Respondent did not dispute his supervisory status, but only the timing of the amendment to the complaint.

He had learned from conversations with Mardis that Local 888 representatives would be at the facility in mid-December to talk to the employees. Mardis did not tell him that he had to tell employees to attend those meetings.

As operations manager, he had infrequent direct contacts with employees. He denied having any conversation with an employee during which he was asked what would happen if they didn't sign a card for Local 888 or told an employee he would be fired if he didn't sign.

Walker, hired in December 1990, had worked first at the North Bergen facility as its operations manager before transferring in June 1992 to Newburgh. While at North Bergen, he had met Max Bruny and another Local 888 representative when they had come, on occasion, to meet employees.

At Newburgh, he ran the entire distribution center overseeing all the departments and their supervisors. In this capacity, he regularly made rounds of the departments, met supervisors and employees to make sure the operations were functioning properly, supervisors were motivated, and employees were performing.

While he was aware the union agents were present to meet employees, he had no idea why and did not see employees going to the meeting room. I find this testimony unworthy of belief in view of his status as an upper level executive for Respondent, his knowledge of the Union's presence at

the facility in December, and the degree to which the meetings with employees, consuming as I have found, from 1–2 hours during the workday, would be naturally disruptive of an efficient and productive working environment which it was his responsibility to foster and establish.

Walker recalled an employee named Ricky Williams, but not his specific department.

I credit Holt that in his presence Walker confirmed to fellow employee Williams that it was true—if they, the employees, did not sign the union cards they couldn't work.

Following the series of union meetings with employees at the Newburgh facility, in late December 1992, Al Guglielmo of Local 888 advised Witt that the Union represented a majority of Respondent's warehouse employees employed at the facility. Thereafter, on December 30, Witt met with Guglielmo to check the cards. After checking the cards, Witt determined that a majority of warehouse employees at the Newburgh facility had authorized Local 888 to represent them for the purpose of collective bargaining and signed, along with Guglielmo, a certification of these results of the card check, listing 100 eligible employees and 74 valid union authorization cards, acknowledging the Union's majority representative status and recognizing it for purposes of bargaining. Following several bargaining sessions held in January 1993, a contract was signed on January 31, retroactive to November 1, 1992, and effective to February 1, 1996, containing, inter alia, union-security and checkoff clauses. Later, a sick leave provision was added amending the agreement which was then reexecuted in February 1993.

Analysis and Conclusions

In *Farmers Energy Corp*., 266 NLRB 722, 723 (1983), the Board has stated the test it applies in weighing whether unlawful assistance has been rendered to a union, in the following terms:

> In assessing the impact of a respondent's assistance to a union, the Board examines the totality of circumstances to determine whether the respondent's conduct tainted the union's majority status. The totality of circumstances consists of post-recognition as well as pre-recognition conduct of a respondent. See *Siro Security Service, Inc*., 247 NLRB 1266, 1271–1273 (1980).

The Board noted further, in the same case, that the Supreme Court expressly endorsed the similar view that in such cases, events cannot be separated ''artificially from their background and consequences, and from the general contemporaneous current of which they were integral parts.'' *Machinists Local 35 (Serrick Corp.) v. NLRB*, 110 F.2d 29, 35 (D.C. Cir. 1939), affd. 311 U.S. 72, 78 (1940).

Here, the memorialization of the understanding arrived at between Witt and Guglielmo even before the opening of the Newburgh facility was shortly followed by the announcement to employees who specifically asked on their appointment to the work force that their benefits, even their pay, was subject to agreement between the Union and Caldor and they would shortly have an opportunity to meet with the Union to discuss and learn about these matters and their specific terms of employment. I conclude that these facts support the conclusion that even before the opening of the facility Caldor had granted recognition to Local 888 and many, if not all, of the terms and conditions of the employees' employment had already been agreed upon subject to the Union's ability to obtain membership applications from a majority of employees under circumstances in which they would be informed that Local 888 was Caldor's union, an understanding regarding their conditions of employment had already been reached with that Union, and they would be required to join it or suffer the loss of their jobs, all in violation of the Act. *Ryder System*, 280 NLRB 1024, 1046 (1986); *Meyer's Cafe & Konditorei*, 282 NLRB 1, 2 (1986); *R. J. E. Leasing Corp*., 262 NLRB 373 (1982).

Mardis' conversation to this effect with Passaro and Abbruzzese at the time of their offers of employment, referring them to the Union for their benefit package, was subsequently reinforced when Guglielmo informed them at union meetings they each were instructed to attend in the facility on working time, that Local 888 was Caldor's Union, that it had an agreement with Caldor providing certain specified terms and benefits and they would be required to join timely at the cost of their job. Mardis reemphasized the working conditions and union obligations to Passaro on the occasion of his tongue-lashing of her for exhibiting such negativism and independence the day following the union meeting she attended.

Guglielmo's coercive directions to employees to sign union cards or face ultimate termination was reinforced not only by Mardis to Passaro, but also to employees Thomas Holt and Ricky Williams by another Caldor manager, George Walker, immediately following their attendance at another union meeting with Guglielmo which they were required to attend during the workday.

These facts support the conclusion that Caldor and Local 888 had unlawfully conspired to deprive employees of their Section 7 rights to a free choice of bargaining representative. They also support the conclusion that in addressing captive employees in the Newburgh facility who had been earlier referred by Respondent to the Union to learn their terms of employment, Guglielmo gave every appearance of speaking not only on behalf of Local 888, but also on behalf of Caldor. Even if his comments were not expressly authorized, Guglielmo was speaking to its employees as Caldor's agent when he informed them of their terms and benefits, the Union's status as their exclusive representative and their obligation to join and support it with their dues.

As the circuit court has noted in *NLRB v. Arkansas-Louisiana Gas Co*. 333 F.2d 790 at 795 (1964), ''In determining responsibility for union activities, the principles of agency and its establishment are to be construed liberally.'' In *Machinists v. NLRB*, 311 U.S. 72, 80 (1940), the Court said, ''The employer, however, may be held to have assisted the formation of a union even though the acts of the so-called agents were not expressly authorized or might not be attributable to him on strict application of the rules of *respondeat superior*.''

Because of their existing relationship, Mardis, in particular, had engaged Guglielmo as Caldor's agent in making his presentation to its employees, and such presentation was within the general scope of his agency authority, even though Caldor and Mardis may not have authorized the specific acts in question. *Alliance Rubber Co*., 286 NLRB 645, 646 (1987) (nonemployee, third-party polygraph examiners held to be special or limited purpose agents authorized to conduct

a single transaction or series of transactions not involving continuity of service. Restatement 2d, Agency, Sec. 3(2) (1958), cited in *Davlan Engineering*, 283 NLRB 803 (1987)). Furthermore, Guglielmo was acting with apparent authority in addressing the employees. Under this doctrine, Caldor through the conduct of its managers will be held responsible for actions of its agent, when it knew or should have known that its conduct in relation to the agent is likely to cause third parties, in this case, the employees, to believe that the agent has authority to speak for it. Restatement 2d, Agency Sec. 27. Id. at 646; *MGR Equipment Corp*., 272 NLRB 353 (1984); *Ryder System*, 280 NLRB 1024 (1986). As the Board observed in *West Bay Maintenance*, 291 NLRB 82 (1988), ''either the principal must intend to cause the third person to believe that the agent is authorized to act for him, or the principal should realize that this conduct (the principal's manifestations to the third party) is likely to create such belief.'' 291 NLRB at 83. See also *Alleghany Aggregates*, 311 NLRB 1165 (1993), citing and quoting from *West Bay Maintenance* with approval. (Involving binding statements of nonemployee, third party ''outsider,'' to whose conduct, the same standard is applied, 311 NLRB 1165 at fn. 3.)

Apart from the conclusion I draw that Guglielmo's conduct bound Caldor as well as Local 888, the nature and content of his solicitations of union membership and authorization cards is an inquiry central to Caldor's defense that it only recognized and entered an agreement with Local 888 after the Union had established its majority representation among unit employees. Thus, the testimony of employees attributing the remarks made to them by Guglielmo prior to, and which induced them, to execute union membership and dues-checkoff applications is highly relevant to this proceeding. Accordingly, for all the reasons I have now reviewed, I deny Respondent's motion to strike the multiple employee testimony of Guglielmo's comments made at the union meetings he addressed at the facility—a motion on which I had previously reserved decision.

It is clear that Guglielmo's December 1992 fraudulent inducements, claiming an agreement with Caldor, its status as Caldor's Union, recognized as exclusive representative for Newburg employees, and requiring the employees to join and financially support it or suffer their termination taint all of the cards subsequently executed by the employees, on the basis of the submission of which by the end of the month, Caldor officially recognized it and later executed a full agreement with it, including, inter alia, union-security and dues-checkoff provisions. *Brown Transport Corp*., 296 NLRB 552 (1989); *Meyers Cafe & Konditorei*, supra; *Safeway Stores*, 226 NLRB 944 (1985).

The cards having thus been tainted, Caldor's recognition of the Union on the basis of them was unlawful. Respondent also subsequently violated Section 8(a)(1), (2), and (3) of the Act by entering into a collective-bargaining agreement with the Union and applying the terms of that agreement at a time when the Union did not represent an uncoerced majority of its employees. *Jayar Metal Corp*., 297 NLRB 603 (1990); *Meyer's Cafe & Konditorei*, supra.

CONCLUSIONS OF LAW

1. Respondent Caldor, Inc. is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local 888, United Food & Commercial Workers Union, AFL–CIO is a labor organization within the meaning of Section 9(b) of the Act.

3. By granting recognition to Local 888 as the exclusive collective-bargaining representative of its full-time and regular part-time warehouse employees employed at its Newburgh, New York facility at a time before the facility had opened for operations and before any employees had been employed in its operations, by informing its employees and candidates for employment that their employment benefits would be determined by Respondent in conjunction with Local 888, and that Local 888 would represent them, by making its premises available for organizational meetings by Local 888 and instructing employees at its Newburgh, New York facility to attend such meetings and on working time, by instructing its employees to join and support Local 888 as a condition of continuing to remain employees, and by instructing its employees to sign authorization cards on behalf of Local 888, Respondent has been rendering unlawful assistance and support to a labor organization in violation of Section 8(a)(1) and (2) of the Act.

4. By entering into a collective-bargaining agreement with Local 888 as the exclusive bargaining representative of its employees in the above-described appropriate unit, and by applying and enforcing the agreement and especially by giving effect to its union-security provision and to authorizations executed by its employees pursuant to the agreement's dues-checkoff provision causing dues, initiation, and assessment fees to be deducted from employees' pay, at such times as Local 888 did not represent an uncoerced majority of the employees in the unit, Respondent has thereby encouraged membership in a labor organization and discriminated against employees with regard to their hire or tenure or terms and conditions of employment in violation of Section 8(a)(1), (2), and (3) of the Act.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices in violation of Section 8(a)(1), (2), and (3) of the Act, I shall recommend that it cease and desist therefrom and that it take certain affirmative actions which are necessary to effectuate the policies of the Act. In particular, I will recommend that Respondent be ordered to withdraw recognition from Local 888 as the exclusive collective-bargaining representative of its employees in the appropriate unit described unless and until that Union is certified as the exclusive representative of the employees in the unit. I shall also recommend that Respondent cease and desist enforcing and maintaining the collective-bargaining agreement it entered with Local 888, effective from November 1, 1992, to and including January 31, 1996, or any extension or modification thereof, and that Respondent reimburse all of its present and former employees employed in the unit for any dues, initiation fees, and assessments deducted from their pay pursuant to the collective-bargaining agreement. Such monetary amounts are to be computed with interest thereon in accord-

ance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[3]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[4]

ORDER

The Respondent, Caldor, Inc., Newburgh, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Granting recognition to Local 888, United Food & Commercial Workers Union, AFL–CIO, or any other labor organization, as the exclusive collective-bargaining representative of its full-time and regular part-time warehouse employees employed at its Newburgh, New York facility at a time before the facility had opened for operations and before any employees had been employed in its operations.

(b) Recognizing and negotiating with Local 888 as the exclusive representative of its employees for the purpose of collective bargaining unless and until such labor organization is certified by the Board as the exclusive representative of the employees pursuant to Section 9(c) of the Act.

(c) Enforcing or giving effect to its collective-bargaining agreement with Local 888 or any extension, renewal, or modification thereof or any superseding agreement, and giving effect to its union-security provision and to authorizations executed by its employees pursuant to its dues-checkoff provision causing dues, initiation fees, assessments, or any other moneys to be deducted from employees' pay and remitted to Local 888, provided that nothing in this Order shall require the withdrawal or elimination of any wage increase or other benefit or terms or conditions of employment which may have been established pursuant to such agreement.

(d) Informing its employees and candidates for employment that their employment benefits would be determined by Respondent in conjunction with Local 888 and that Local 888 would represent them.

(e) Making its premises available for organizational meetings by Local 888 and instructing employees at its Newburgh, New York facility to attend such meetings and on working time.

(f) Instructing its employees to join and support Local 888 as a condition of retaining employment and to sign authorization cards on behalf of Local 888.

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

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

(a) Withdraw and withhold recognition from Local 888, United Food & Commerical Workers Union, AFL–CIO as the exclusive collective-bargaining representative of its full-time and regular part-time warehouse employees employed at its Newburgh, New York facility, unless and until the labor organization has been duly certified by the Board as the exclusive representative of such employees.

(b) Reimburse all present and former employees for all initiation fees, dues, assessment, or any other moneys which may have been paid to Local 888 pursuant to the union-security and dues-checkoff agreements between it and that Union, with interest.

(c) Preserve and, on request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of dues and any other moneys to be repaid under the terms of this Order.

(d) Post at its warehouse facility in Newburgh, New York, copies of the attached notice marked ''Appendix.''[5] 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.

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

[3] Under *New Horizons*, interest is computed at the ''short-term Federal rate'' for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.

[4] 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.

[5] 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.